No. 91-572

Supreme Court, U.S.
FILED
SEP 30 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ALLRIGHT COLORADO, INC.; CONTINENTAL AIRPORT PARKING, INC.; ENNIS, INC., d/b/a MONACO PARKING; PHCHODAUX HOWDY INTERNATIONAL GROUP, INC., d/b/a PREMIER PARKING, INC.;

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a governmental subdivision of the State of Colorado, d/b/a SMART; JOHN MROZEK, in his capacity as Manager of Public Works; GEORGE DOUGHTY, in his capacity as Director of Aviation of Stapleton,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD L. SHEARER
Counsel of Record
LANGDON J. JORGENSEN
NORMAN F. KRON, JR.
CALKINS, KRAMER, GRIMSHAW & HARRING, P.C.
1700 Lincoln Street
Suite 3800
Denver, Colorado 80203
(303) 839-3800

Attorneys for Petitioners

September 27, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a city is a commercial participant in the marketplace, what test should a court use to determine the applicability of the state action immunity defense from liability under the Sherman Antitrust Act?

TABLE OF CONTENTS

Page

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS 1

JURISDICTION 1

STATUTES 1

STATEMENT OF THE CASE 3

I. FACTS 3

II. BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE 5

ARGUMENT: REASONS FOR GRANTING THIS PETITION 5

I. THE LAW CONCERNING THE STATE ACTION IMMUNITY DEFENSE TO SHERMAN ANTITRUST ACT LIABILITY IS UNCLEAR 5

II. THIS CASE AFFORDS AN OPPORTUNITY FOR THIS COURT TO PROVIDE A CLEAR ARTICULATION OF THE TEST TO BE USED TO DETERMINE THE AVAILABILITY OF THE STATE ACTION IMMUNITY DEFENSE TO A MUNICIPALITY WHEN THE MUNICIPALITY IS A COMMERCIAL PARTICIPANT IN THE MARKETPLACE 6

III. CONCLUSION 11

APPENDIX 1: Appellate Court Opinion, Order, and Conclusions of Law ..... App. 1

APPENDIX 2: Trial Court Ruling of the Court: Transcript of Proceedings ..... App. 28

APPENDIX 3: Portions of the "Coddington Report" incorporated by reference into the Trial Court's Ruling ..... App. 48

TABLE OF AUTHORITIES

Page

CASES

Allright Colorado, Inc. v. City and County of Denver, 937 F.2d 1502 (10th Cir. 1991) 1, 4, 9

City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) ..... *passim*

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 44 L. Ed. 2d 364 (1978) 12

Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980), *reversed*, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982) ..... 10n.

Limeco, Inc. v. Division of Lime of the Mississippi Department of Agriculture and Commerce, 546 F. Supp. 868 (N.D. Miss. 1982) 7

Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310 (8th Cir. 1991) 7, 8, 11

Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 2d 315 (1943) 8

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) 8

Union Pacific Railroad Co. v. United States, 313 U.S. 450, 61 S. Ct. 1064, 85 L. Ed. 2d 1453 (1941) 10

STATUTES

15 U.S.C. § 2 ..... 1, 2, 5

15 U.S.C. § 15 ..... 1, 2, 5

15 U.S.C. § 26 ..... 1, 2, 3, 5

15 U.S.C. § 35(a) ..... 1, 3, 7n.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinion and judgment of the United States Circuit Court of Appeals, Tenth Circuit, is printed at Appendix 1. It has been published by West Publishing Company as *Allright Colorado, Inc. v. City and County of Denver,* 937 F.2d 1502 (10th Cir. 1991). Unofficial reports include *Allright Colorado, Inc. v. City and County of Denver,* 1991 U.S. App. (LEXIS) 13557, and *Allright Colorado, Inc. v. City and County of Denver,* 1991-1 Trade Cas. (CCH) ¶69,484. The judgment and decree of the United States District Court for the District of Colorado, printed at Appendix 2, is unreported.

JURISDICTION

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was entered on July 1, 1991. No rehearing was sought. No extension of time to file this Petition for Writ of Certiorari was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Petitioners seek relief under the antitrust laws of the United States, 15 U.S.C. §§ 2, 15, and 26 and 28 U.S.C. § 1337.

STATUTES

The Sherman Antitrust Act, 15 U.S.C. §§ 2, 15(a), 26 and 35(a), states in part:

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by court of equity, under the rules

governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: . . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of the suit, including a reasonable attorney's fee, to such plaintiff.

§ 35. Recovery of damages, etc., for antitrust violations from any local government, or official or employee thereof acting in an official capacity

(a) Prohibition in general

No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

STATEMENT OF THE CASE

I. FACTS

The Petitioners[1] are operators of private shuttle bus parking lots located near Stapleton International Airport in Denver, Colorado. Petitioners rent parking space in their lots to airline passengers who then use Petitioners' shuttle buses to travel to the airport terminal. Upon their return, these customers are shuttled back to Petitioners'

[1] The names of all parties appear in the caption of the case. Sup. Ct. R. 16.1(b). Allright Colorado, Inc., is a wholly owned subsidiary of Allright Corporation. Sup. Ct. R. 29.1.

parking lots to pick up their vehicles. Respondent City and County of Denver[2] owns and operates Stapleton International Airport. The City also operates remote shuttle bus parking lots which provide the same service as the Petitioners' lots and which are in direct competition with the Petitioners.[3] *See Allright Colorado, Inc. v. City and County of Denver,* 937 F.2d 1502, 1504 (10th Cir. 1991); App. 3.

Through 1983, Petitioners Allright and Monaco shared 100% of the airport shuttle bus parking business. The City entered the shuttle bus parking business in 1983. In the first five full years after its entry into the shuttle bus parking market, the City increased its share of the market from 0% to 45%, and is now by far the largest market participant. *Allright,* 937 F.2d 1502, 1504, 1504 n. 4 (App. 4-5). *See also* App. 53-58. The appellate opinion sets forth a materially accurate description of the most obvious instances where Denver has used its governmental power to hinder its private competitors in its attempt to monopolize a market in which it is now the leading market participant. *Allright,* 937 F.2d 1502, 1504-1505 (App. 3-4).

---

[2] The individual defendants are employees of the City and County of Denver who manage airport operations.

[3] As stated by the trial court in its findings of fact: "[I]t seems to me that for purposes of an antitrust analysis Denver is a player on the board, as any private operator of an airport would be." App. 36.

II. BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

The Complaint in this case was filed on June 20, 1989. The jurisdiction of the district court for the subject of this Petition was based upon 28 U.S.C. §§ 1331 and 1337, and the antitrust laws of the United States, 15 U.S.C. §§ 2, 15 and 26.

ARGUMENT: REASONS FOR GRANTING THIS PETITION

I. THE LAW CONCERNING THE STATE ACTION IMMUNITY DEFENSE TO SHERMAN ANTITRUST ACT LIABILITY IS UNCLEAR.

Presently there is no clear test to establish when the state action immunity defense is available to a city which is acting as a market participant. Numerous antitrust cases are filed against local governments each year, and the state action immunity defense is asserted in nearly every such case. Establishing a clear test for the availability of the state action immunity defense in cases involving claims that a local governmental market participant violated the Sherman Antitrust Act is an issue of national importance.

II. THIS CASE AFFORDS AN OPPORTUNITY FOR THIS COURT TO PROVIDE A CLEAR ARTICULATION OF THE TEST TO BE USED TO DETERMINE THE AVAILABILITY OF THE STATE ACTION IMMUNITY DEFENSE TO A MUNICIPALITY WHEN THE MUNICIPALITY IS A COMMERCIAL PARTICIPANT IN THE MARKETPLACE.

The Tenth Circuit decision in this case misapplied this Court's articulation of the "commercial participant" doctrine expressed in *City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S. Ct. 1344, 1351, 113 L. Ed. 2d 382 (1991).

In *City of Columbia*, this Court, speaking through Justice Scalia, expressly recognized that the state action immunity defense may not apply where the city is itself a "commercial participant" and wields power or performs activities in direct competition with private enterprise in an otherwise private market:

> [State action antitrust] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.

City of Columbia, 111 S. Ct. 1344, 1351, 113 L. Ed. 2d 382.

This Petition involves a case that fits squarely within the limitation to the state action immunity doctrine set forth in *City of Columbia*. Unlike the run-of-the-mill municipal antitrust case, the central issue in the instant case is not federalism. Federalism concerns exist when the application of federal law interferes with a state's ability to impose legitimate regulations upon private activities. Petitioners have no quarrel with the need of the

sovereign states and their subdivisions to exercise their legitimate regulatory powers. But when a city, such as Denver in the instant case, undertakes to enter a marketplace, and then uses its governmental powers to prey upon its lawful competitors, the city goes beyond the realm of mere regulation and instead occupies the status of a private market participant that unlawfully seeks monopoly power. If a city participates in a private market, the city should be subject to the same federal antitrust laws as the private market participant.[4] *See Limeco, Inc. v. Division of Lime of the Mississippi Department of Agriculture and Commerce*, 546 F. Supp. 868, 870-871 (N.D. Miss. 1982) for an excellent analysis concluding that federalism concerns do not bar application of federal antitrust law when the state acts as a competitor, rather than as sovereign.

Only three reported cases have considered the "commercial participant" doctrine: *City of Columbia*, the instant case, and *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310 (8th Cir. 1991). In *Paragould*, however, the Eighth Circuit Court declined to apply the "commercial participant" doctrine to facts where it would appear applicable, because:

> As yet, the market participant exception is merely a suggestion and is not a rule of law. Until such a transformation occurs, we will continue to use the necessary and reasonable test established by this Circuit.

Paragould, 930 F.2d at 1312-1313.

---

[4] Petitioners recognize that municipalities are immune from damages claims for antitrust violations, 15 U.S.C. § 35(a), and no damages have been sought in this case.

The commercial participant doctrine articulated by Justice Scalia on behalf of this Court is an excellent tool to lead the courts out of the legal thicket that presently exists with respect to when a local government engaging in anticompetitive business practices may assert state action immunity as a defense to an antitrust claim. However, the commercial participant doctrine articulated by this Court in *City of Columbia* was ignored by the Eighth Circuit in *Paragould* and was misapplied by the Tenth Circuit in this case. Petitioners believe that *City of Columbia* will continue to be ignored and misapplied unless this Court fleshes out the legal test for the commercial participant cases. It appears that if the municipal commercial participant doctrine is to be given meaning, that meaning must come from this Court or the doctrine will remain forever "merely a suggestion."

Legitimate regulation and predatory conduct by municipal competitors are substantially different. The test for whether immunity applies when legitimate regulation is involved is clear: state and local governments have limited immunity from Sherman Act liability when regulating pursuant to a clearly expressed state policy, even where displacement of private competition by the local government is a foreseeable result of the regulation. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39-40, 105 S. Ct. 1713, 1716-1717, 85 L. Ed. 2d 24 (1985), explaining *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 2d 315 (1943). This limited immunity is necessary to protect state and local governments from antitrust liability each time a legitimate regulation has an anticompetitive effect. In contrast, while the existence of a separate test for whether such immunity applies when the municipality is

a market participant has been articulated by this Court in *City of Columbia*, the Court has not yet provided any guidance on how this test should be applied.

The Tenth Circuit opinion in this case demonstrates the current confusion. In this case, the test applied by the Tenth Circuit to the City, undisputedly a market participant, was the same as would be applied if the City were acting in a legitimate regulatory capacity.[5] While noting the existence of *City of Columbia*, the Tenth Circuit incorrectly applied the commercial participant analysis, stating:

> The fact that the City is also in some sense a competitor of plaintiffs does not alter the basic test for state action immunity nor does it diminish the City's regulatory authority over the Airport and plaintiffs' activities. The question remains whether there is a clear and express state policy to displace competition with regulation and authorizing the challenged activities.

Allright, 937 F.2d 1502, 1510 (App. 20). This analysis is incorrect. As Justice Scalia noted in *City of Columbia*, the fact that a city is a competitor *does* alter the basic test, or at least adds to it. Once a city has decided to become more than a mere regulator, and has chosen to

---

[5] The trial court did not make this error, but instead recognized the fundamental difference in city as competitor vs. city as regulator: "[H]ere we must draw the distinction clearly between applying the law of antitrust to the City and County of Denver as a competitor with the plaintiffs and governmental action by the City and County of Denver." App. 35. The trial court found that state action immunity did not shield the City from Sherman Act liability.

become an active player in the market, it must comply with federal antitrust law. Once a city becomes an active market participant in a market that has not, by state policy, been awarded to the governmental subdivision, the city should not, as a matter of law, be allowed to use its extraordinary governmental powers to crush its competition.

City of Columbia recognizes the fundamental difference between how a city should be treated for Sherman Act purposes when the city itself is a market participant, and how it should be treated when the city merely regulates private conduct. Although not stated in terms of waiver, the effect of the exception is that a city waives its state action immunity when it ceases to act solely as a government and launches a private enterprise. *See Union Pacific Railroad Co. v. United States*, 313 U.S. 450, 61 S. Ct. 1064, 85 L. Ed. 2d 1453 (1941) (active interference in a market by a municipality does not enjoy blanket state action immunity from federal antitrust law). In deciding this case, the Tenth Circuit ignored the important distinction stated by this Court in *City of Columbia*.[6]

---

[6] Previously, the Tenth Circuit has acted to eradicate needed constraints upon local governments by its expansive interpretation and application of the state action immunity doctrine. The Supreme Court has previously reined in the Tenth Circuit in this area of the law. In *Community Communications Co. v. City of Boulder*, 630 F.2d 704, 708 (10th Cir. 1980), *reversed*, 455 U.S. 40, 56-57, 102 S. Ct. 835, 843, 70 L. Ed. 2d 810 (1982), the Tenth Circuit attempted to expand the concept of unbridled governmental power and state action immunity by allowing general home rule authority to be used as authority

(Continued on following page)

This Court's articulation of the fundamental difference in the roles of municipalities as regulators and as market participants, and, perhaps, use of the suggested waiver analysis, would clarify the limitation on the state action immunity defense stated in *City of Columbia* and send a clear message to the circuit and district courts that cities which abuse their governmental powers when acting as market participants are not protected by state action immunity.

III. CONCLUSION

This case is a classic example of the type of case that the Court may consider under Sup. Ct. R. 10.1(c). This case also presents an excellent opportunity to clarify the law in an area of significant national concern. Clarification of the legal analysis required in a municipal commercial participant case is needed, as within the last few months at least two courts, the Tenth Circuit and the Eighth Circuit, have already misapplied the law by ignoring or misunderstanding the guidance offered by this Court's recent decision in *City of Columbia*. This case and the *Paragould* case are the first circuit court opinions to cite *City of Columbia*. If this issue is not promptly resolved by this Court, these cases are likely to obscure a

---

(Continued from previous page)

for anticompetitive conduct in the cable television market. This Court, reversing the Tenth Circuit, stated that there must be a clear articulation of state policy, *inter alia*, before a city may displace competition with regulation. Once again, guidance from this Court will help the circuits in the application of the Sherman Act.

significant doctrine that the Supreme Court obviously intended to be used in antitrust cases involving municipalities. It also appears that unless this Court intercedes to flesh out the commercial participant doctrine set forth in *City of Columbia,* the state action immunity defense is likely to become more confused than it was immediately following *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 98 S. Ct. 1123, 44 L. Ed. 2d 364 (1978).

City of Columbia set forth an important tool which may help courts, counsel and the citizens of our country find their way out of the proprietary/governmental thicket. This case presents the opportunity for this Court to develop the commercial participant doctrine and clarify the law of state action immunity. The ultimate result, Petitioners respectfully suggest, would be for this Court to explain and apply the commercial participant limitation on the state action immunity doctrine, then remand the case to the Tenth Circuit for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

CALKINS, KRAMER, GRIMSHAW & HARRING, P.C.

RICHARD L. SHEARER
Counsel of Record
LANGDON J. JORGENSEN
NORMAN F. KRON, JR.
1700 Lincoln Street
Suite 3800
Denver, Colorado 80203
Telephone: (303) 839-3800

Attorneys for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1991

ALLRIGHT COLORADO, INC.; CONTINENTAL AIRPORT PARKING, INC.; ENNIS, INC., d/b/a MONACO PARKING; PHCHODAUX HOWDY INTERNATIONAL GROUP, INC.; d/b/a PREMIER PARKING, INC.,

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a governmental subdivision of the State of Colorado, d/b/a SMART; JOHN MROZEK, in his capacity as Manager of Public Works; GEORGE DOUGHTY, in his capacity as Director of Aviation of Stapleton,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX TABLE OF CONTENTS

APPENDIX 1: Appellate Court Opinion, Order, and Conclusions of Law..... App. 1

APPENDIX 2: Trial Court Ruling of the Court: Transcript of Proceedings..... App. 28

APPENDIX 3: Portions of the "Coddington Report" which was incorporated by reference into the Trial Court Ruling of the Court: Transcript of Proceedings.. App. 48

ALLRIGHT COLORADO, INC.; Continental Airport Parking, Inc.; Ennis, Inc., dba Monaco Parking; Phchodaux Howdy International Group, Inc., dba Premier Parking Inc., Plaintiffs-Appellants, Cross-Appellees,

v.

The CITY AND COUNTY OF DENVER, a governmental subdivision of State of Colorado dba SMART; John Mrozek, in his capacity as manager of Public Works; George Doughty, in his capacity as director of Aviation of Stapleton, Defendants-Appellees, Cross-Appellants.

Nos. 89-1379, 90-1003.

United States Court of Appeals,
Tenth Circuit.

July 1, 1991.

Richard L. Shearer (Langdon J. Jorgensen, with him on the briefs), Calkins, Kramer, Grimshaw & Harring, Denver, Colo., for plaintiffs-appellants, cross-appellees.

Helen Eckardt Raabe, Asst. City Atty. (Dean Speirs, Asst. City Atty., and B. Lawrence Theis, Walters & Theis, with her on the briefs), Denver, Colo., for defendants-appellees, cross-appellants.

Before McKAY, ANDERSON, Circuit Judges, and CHRISTENSEN,* District Judge.

STEPHEN H. ANDERSON, Circuit Judge.

Plaintiffs, four corporations which provide remote lot parking and courtesy shuttle bus service to airline

---

* Honorable A. Sherman Christensen, Senior Judge, United States District Court, District of Utah, sitting by designation.

customers at Stapleton International Airport ("Stapleton" or "Airport") in Denver, Colorado, appeal the dismissal of their antitrust and 42 U.S.C. § 1983 suit against the City and County of Denver ("Denver" or "City") and two city employees. They alleged that Denver's proposed adoption of new Rules and Regulations imposing certain fees on the operation of their shuttle buses and requiring them to sign certain agreements, in conjunction with other alleged restrictions on plaintiffs' operations at Stapleton, violated section two of the Sherman Act, 15 U.S.C. § 2, as well as the equal protection, due process and commerce clauses of the United States Constitution and certain provisions of Denver's City Charter. Upon the conclusion of plaintiffs' case in their trial to the court, the district court granted defendants' Fed.R.Civ.P. 41(b) motion to dismiss. Plaintiffs appealed that dismissal, and defendants cross-appealed the district court's refusal to find their actions immune from suit under the antitrust laws. We affirm.

BACKGROUND

Plaintiffs (Allright Colorado, Inc., Continental Airport Parking, Inc., Ennis, Inc. d/b/a Monaco Parking, and Phchodaux Howdy International Group, Inc., d/b/a Premier Parking, Inc.) are Colorado corporations engaged in the business of operating remote parking lots at Stapleton and providing a courtesy shuttle bus service between those lots and the terminals at Stapleton. Allright has been engaged in that business since 1978. The other plaintiffs entered the business in 1985 and 1986. Stapleton is a proprietary enterprise owned and operated by Denver, a governmental subdivision of the State of

Colorado. Defendant John Mrozek was the Manager of Denver's Department of Public Works at the time of trial. His duties included the management and operation of the Airport and the public roads adjacent to the Airport. Defendant George Doughty was the Director of Aviation for Stapleton. Doughty's responsibilities included the immediate management and operation of the Airport, including adjacent public roads. Mrozek was Doughty's supervisor.

This case concerns Denver's operation of parking lots and an accompanying shuttle bus service at Stapleton. In its early stages, the shuttle bus parking service at Stapleton was exclusively offered by private parties such as plaintiffs.[1] In 1983, Denver began operation of Shuttle Lot #1 with accompanying shuttle bus service. It established Shuttle Lot #2 in 1984 and Shuttle Lot #3 in 1985. Shuttle Lot #1 was dedicated to other uses in 1986. Its shuttle bus service is called SMART (Stapleton Mass Rapid Transit). While SMART and plaintiffs now charge comparable prices for daily parking, evidence at trial showed that in 1985 and 1986, SMART charged somewhat less than plaintiffs.

Initially, plaintiffs had unrestricted access to the Stapleton terminal, using the roads adjacent to the airport.[2] Although the evidence was not clear as to exact dates, at some point after plaintiffs commenced business, Denver

---

[1] There was some testimony that the City had for some time operated a remote parking lot which was used as an overflow lot at peak times.

[2] Those roads are public rights-of-way. *See City and County of Denver v. Publix Cab Co.*, 135 Colo. 132, 308 P.2d 1016 (1957).

imposed restrictions on all commercial operators at Stapleton, requiring them to use certain designated commercial lanes and pick-up locations. In late 1984 or early 1985, Stapleton imposed permit fees on plaintiffs' activities at the Airport. SMART buses were exempted from the permit fees. Subsequently, Denver required plaintiffs to use different access routes than its own shuttle buses used, and allocated pick-up locations at the terminal. Plaintiffs allege, and the district court found, that SMART buses have the more favorable pick-up locations. Additionally, the district court found that the routes imposed on plaintiffs' shuttle buses are less favorable.[3] In 1988, Denver installed access gates on the commercial lanes and required all commercial operators to use electronic cards to access the commercial lanes.

In addition to the above restrictions on plaintiffs' activities at Stapleton, Denver has allegedly further disadvantaged plaintiffs by granting to its own SMART buses the exclusive right to advertise on Stapleton property, the exclusive right to use public rights-of-way for signs directing travellers to its own lots, the exclusive right to use the Stapleton information radio to advertise, and a more favorable representation on the Airport directory. The evidence presented at trial established that, during this time period, SMART experienced a significant increase in its share of the remote shuttle bus parking market, whereas plaintiffs experienced a decline.[4]

---

[3] The district court found that "there's a doubling back which both affects the time, the convenience of the passengers, and the costs to the plaintiffs of running those shuttles." Transcript of Ruling of the Court at 9.

[4] Plaintiffs' expert, Dean C. Coddington, prepared a "Market Analysis and Impact Assessment of Shuttle Bus Parking,

(Continued on following page)

In 1989, defendants took the actions which prompted this lawsuit. By letter dated May 17, 1989, they informed plaintiffs that they planned to adopt new Rules and Regulations which would: (1) impose access fees on commercial operators at the airport, including plaintiffs; and (2) require commercial operators such as plaintiffs to sign permit agreements in which they would consent to pay the new access fees or lose their access cards and be thereby barred from the airport terminal. Denver's own SMART buses would not be required to pay any such fees. The fees were based upon the time spent at the lower level of the Airport terminal building where passengers were picked up. Thus, plaintiffs' shuttle buses incurred added costs if they lingered at the terminal to assure that their buses were always available for travellers. Because it was exempt from the fees, SMART could always have a bus waiting for travellers. The access fee imposed on plaintiffs was approximately 50% higher than

---

(Continued from previous page)

Stapleton International Airport." Plaintiffs' Exhibit 100, Addendum Tab 100. The district court incorporated by reference the relevant portions of that Exhibit. That Exhibit showed that, in 1984, plaintiff Allright had 62.1% of the off-site parking market, plaintiff Monaco had 37.4% of that market, and SMART and plaintiffs Premier and Continental had 0%. By 1989, SMART's share had increased to 45%, whereas Allright's had declined to 24.1%, Monaco's had declined to 18.3% and Premier and Continental had market shares of 4.9% and 7.7% respectively. Mr. Coddington projected that by 1994, SMART would have more than 50% of that market, whereas the four plaintiffs would have less than 30%. The Exhibit also included an analysis of the impact of SMART on plaintiffs' revenues, and an analysis of the marketing efforts of SMART and plaintiffs.

that imposed on certain other private shuttle bus operators (i.e. shuttle bus operators between hotels, ski resorts, car rental companies or other comparable businesses and the airport) who use the same commercial lanes and routes. The permit agreement also required plaintiffs to disclose financial information and customer lists to the Manager of Public Works, and imposed certain other allegedly onerous burdens on plaintiffs. The Department of Public Works adopted the Rules and Regulations on June 12, 1989 and they were to take effect on July 1, 1989.

Plaintiffs filed this lawsuit on June 20, 1989, alleging that, by all of the above actions, "the City has consistently used its governmental authority and power to systematically bestow unfair and illegal competitive advantages upon SMART, to the detriment and exclusion of the Plaintiffs." Complaint at 5, R.Vol. I Tab 1. Plaintiffs argue that defendants engaged in those activities in order to monopolize or attempt to monopolize the Airport parking market in violation of section two of the Sherman Act, 15 U.S.C. § 2.[5] They further allege that the permit and access fees constitute an undue burden on interstate commerce, and that the allegedly unfavorable treatment of plaintiffs violates the due process and equal protection clauses of the Fourteenth Amendment. Finally, they argue that the fees are in fact taxes which were not properly enacted under the City Charter, and that the permit agreements are adhesion contracts invalid as contrary to public

[5] They initially also alleged a violation of Colorado state antitrust laws, but voluntarily dismissed that claim before trial.

policy. They sought injunctive relief, damages and attorneys' fees and costs.[6]

Defendants filed a Fed.R.Civ.P. 12(b)(6) motion to dismiss, followed by a motion for summary judgment. Trial to the court was held on November 20-22, 1989. At the close of plaintiffs' case, the court granted defendants' Fed.R.Civ.P. 41(b) motion to dismiss on the ground that plaintiffs had "shown no right to relief." It ruled that plaintiffs had failed to establish that there was a dangerous probability of success in monopolizing the relevant market and that defendants had a specific intent to monopolize. Plaintiffs' attempt to monopolize claim was therefore dismissed. The court held that plaintiffs' monopolization claim failed apparently because plaintiffs failed to prove monopoly power.[7]

---

[6] Simultaneously with their complaint, plaintiffs filed a motion for a temporary restraining order, which resulted in a hearing, converted by agreement of the parties to a hearing for a preliminary injunction. The hearing was, however, continued because the parties reached an interim agreement to not require payment of the new fees or require plaintiffs to sign the permit agreement until January 1, 1990. The fees are nonetheless accruing.

[7] The court ruled from the bench and did not reduce its ruling to writing. The court's reasoning for rejecting plaintiffs' monopolization claim is not completely clear. The court stated:

> Now, the evidence does not establish that Denver is a monopolist here and in this aspect of the analysis, it is important, I think, to bring in the limitations on what Denver can do as a government, so in this sense there is a necessity. I think, to overlap the principles and recognize that Denver can't be a

(Continued on following page)

The court rejected plaintiffs' due process and equal protection claims because it concluded defendants' classification of commercial operators for the purposes of different fee schedules and other disparate treatment satisfied the rational basis test. Plaintiffs do not appear to challenge the dismissal of their interstate commerce claim or their pendent state law claims. The court found against defendants, however, on their claim of immunity under the state action immunity doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Plaintiffs timely

---

(Continued from previous page)

> monopolist and, as I said in colloquy with plaintiffs' counsel, Denver doesn't claim and certainly doesn't have the power to simply preclude the plaintiffs from accessing this airport by saying, "We are going to be the exclusive shuttle parking services provider for Stapleton International Airport." It can't do that because of other limitations on it as a government, which, of course, involves the concepts in these other claims.
>
> So in a very real sense, here I have to accept the plaintiffs' view that there is a confluence of principles because they can't become a monopoly in that way, and additionally, as we'll see in a moment, they can't use their ability to extract charges as conditions for the entry here to an extent that is unreasonable; in other words, there are limits to the rates that they can charge, the fees for access and they're the very limits that are being claimed in the other claims for relief, and that's another reason why the city can't be in the position of a monopolist with respect to this service in this market. Therefore, plaintiffs have failed to prove a Section II, a Sherman II violation in this case.

Transcript of Ruling of the Court at 11-12.

appealed the dismissal of their claims and defendants cross-appealed the court's decision that defendants were not immune from antitrust suit.

DISCUSSION

I. *State Action Immunity.*

Defendants cross-appeal the district court's refusal to hold them immune on state action immunity grounds from an antitrust suit, arguing that the state has expressly authorized local entities to own and operate airports, including all facilities and operations, such as parking, necessary thereto.

Municipalities are shielded from antitrust liability for allegedly anticompetitive acts "authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' " *Hallie v. City of Eau Claire*, 471 U.S. 34, 39, 105 S.Ct. 1713, 1716, 85 L.Ed.2d 24 (1985) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413, 98 S.Ct. 1123, 1137, 55 L.Ed.2d 364 (1978)); *see also Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51-52, 102 S.Ct. 835, 840-841, 70 L.Ed.2d 810 (1982); *Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth.*, 933 F.2d 853 (10th Cir.1991); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1120 (10th Cir.1991); *Oberndorf v. City and County of Denver*, 900 F.2d 1434 (10th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 129, 112 L.Ed.2d 97 (1990). This court follows a two-part test for evaluating municipal state action immunity. "First, the state legislature must have authorized the action under challenge. Second, the legislature must have intended to displace competition with regulation." *Jacobs,*

Visconsi & Jacobs Co., 927 F.2d at 1120; *see also Buckley Constr., Inc.*, 933 F.2d at 855; *Oberndorf*, 900 F.2d at 1438.[8] *Express* authorization of the allegedly anticompetitive acts is not required. *Hallie*, 471 U.S. at 42, 105 S.Ct. at 1718 ("[i]t is not necessary . . . for the state legislature to have stated explicitly that it expected that City to engage in conduct that would have anticompetitive effects"). It is

---

[8] *Oberndorf* was the first opinion in this circuit to frame the municipal immunity question in terms of two parts. We there noted that "we must consider two prerequisites to proper application of the state action exception to municipal action." 900 F.2d at 1438. Because in that case the Colorado Urban Renewal Law manifestly evidenced a clearly articulated and expressly stated policy to displace competition, we focused our inquiry on whether the City's actions were authorized by that law. In *Jacobs, Visconsi & Jacobs Co.*, we called the inquiry a "two-part test." 927 F.2d at 1120. In practice, of course, the two parts will not always have equal prominence. *See Oberndorf*, 900 F.2d at 1438-39. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), the Supreme Court recently stated that the inquiry into municipal "authority to regulate" will not be an exacting one:

> [I]n order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law. . . . It suffices for the present to conclude that here no more is needed to establish, for *Parker* purposes, the city's authority to regulate than its unquestioned zoning power over the size, location, and spacing of billboards.

111 S.Ct. at 1350. The two parts of the inquiry are designed to answer the central question – whether there is a "clearly articulated and affirmatively expressed policy" to displace competition. *Hallie*, 471 U.S. at 44, 105 S.Ct. at 1719.

sufficient if the anticompetitive conduct "is a foreseeable result" of the stated policy or it is "clear that anticompetitive effects logically would result from [the] broad authority to regulate." *Id.* Nonetheless, there must be a "clearly articulated and affirmatively expressed" state policy to displace competition. *Id.* at 44, 105 S.Ct. at 1719.

The two most recent Supreme Court decisions on this subject help define the parameters of the municipal immunity inquiry. In *Hallie*, Wisconsin statutes granted the authority to cities to construct, add to, alter and repair sewage systems, to determine the areas in which the sewage systems would operate and to refuse to provide service outside those areas. The statutes further empowered the State Department of Natural Resources to require cities to construct their sewage systems so that unincorporated areas could connect to them provided the landowners in the unincorporated areas agreed to become annexed to the cities. Four unincorporated towns adjacent to the city of Eau Claire alleged that the city violated the antitrust laws by refusing to supply sewage treatment services to the residents of the towns unless a majority of those residents voted to become annexed to the city and to use the city's sewage collection and transportation services. The Court held that the city was immune.

> [T]he statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. . . . [I]t is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is

> clear that anticompetitive effects logically would result from this broad authority to regulate.

Hallie, 471 U.S. at 42, 105 S.Ct. at 1718.

By contrast, in *Boulder,* the Court held that the Home Rule Amendment of the Colorado constitution conferring upon municipalities the general authority to govern local affairs was merely a "neutral" expression of state policy, which did not sufficiently articulate a state policy to displace competition:

> But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality.

Boulder, 455 U.S. at 55, 102 S.Ct. at 842 (emphasis original). Thus, an ordinance passed by the city of Boulder imposing a moratorium on a cable television company's expansion was not protected from antitrust challenge by the state action doctrine.

We therefore examine the relevant statutes to determine whether they authorized the actions challenged and

whether they evidence a "clearly articulated and affirmatively expressed" policy to displace competition in the provision of off-airport shuttle bus parking.[9]

Those statutes provide as follows:

> **41-4-101. Operation a governmental function.** The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; . . . the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports . . . ; and the exercise of any other powers granted in this part 1 to any county, city and county, city . . . are hereby declared to be public governmental functions. . . .

Colo.Rev.Stat. § 41-4-101. Section 41-4-106 authorizes the operation of airports by counties:

> **41-4-106. Operation of airports.** In connection with the erection, maintenance, and operation of any such airport or navigation facilities, any county has the power and jurisdiction . . . to

---

[9] We reject plaintiffs' argument that Denver is authorized to own and operate Stapleton by Article XX of the Colorado constitution, the "home rule" provision, instead of by other statutory provisions more specifically relating to airports. In *Sterling Beef Co. v. City of Fort Morgan*, 810 F.2d 961 (10th Cir.1987), this court noted that the home rule provision in the constitution "round[s] out the basic authority" contained in the particular statute conferring upon the city of Fort Morgan, a home rule city, the authority to engage in the allegedly anti-competitive acts challenged there. The primary focus of our opinion in *Sterling Beef* was on the particular statutes, not the home rule provision. Under *Boulder*, it is clear that the grant of home rule authority by itself is an insufficient expression of state policy to displace competition.

> regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airport; to exact and require charges, fees, and tolls, . . . ; to lease or assign for operation such space or area . . . necessary or useful in connection therewith; . . . to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport. . . .

Colo.Rev.Stat. § 41-4-106.[10] Sections 41-4-201 and 41-4-204 generally provide comparable authority to cities to own, maintain and operate airports. Colo.Rev.Stat. § 31-15-711(f) provides authority for cities to maintain and operate public parking facilities.

Defendants assert that those statutes clearly and affirmatively express a state policy to displace competition in the operation of airports and related activities, including off-airport shuttle bus parking. We agree.

As the Supreme Court did in *Hallie*, we turn to the specific language of the statutes. Section 41-4-106 clearly confers upon counties a broad authority to regulate airport activities, including the power "to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airports; to exact and require charges, fees, and tolls . . . ; to lease or assign for operation such space or area . . . necessary or useful in

---

[10] It appears that the city and county of Denver is considered a "county" under the Public Airport Authority Law, Colo.Rev.Stat. §§ 41-3-101 to -108.

connection therewith; . . . to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport." *See also* § 41-4-204 (same authority granted to cities). That is precisely what the City has done in this case – it has regulated the removal and embarkation of passengers to and from the airport; it has exacted fees and charges; it has assigned areas of operation to plaintiffs; it has provided rules and regulations governing the use of the airport and the means of transportation within the airport. Further, it is certainly a "forseeable result" of that broad authority to regulate that competition in the provision of shuttle bus services between the Airport Terminal and off-airport parking lots would be displaced. Caselaw supports our conclusion.

As indicated, in *Hallie* itself, the Court found it "sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from the broad authority to regulate." *Hallie*, 471 U.S. at 42, 105 S.Ct. at 1718.

In *Sterling Beef v. City of Fort Morgan*, 810 F.2d 961 (10th Cir.1987), this court found immunity in an equally broad statutory scheme. The city of Fort Morgan, Colorado had a natural monopoly in the provision of natural gas. When Sterling Beef Company attempted to purchase natural gas for its meat processing plant at a cheaper price from a private company by connecting to that company's gas distribution system outside the city limits, Fort Morgan passed an ordinance making it unlawful for any person, without a permit or franchise from the city, to erect or operate "any natural gas pipeline . . . or system

. . . within the city in order to sell or distribute or provide non-municipal gas . . . to any user or consumer within the city; or . . . to interconnect any building . . . to any natural gas pipeline or system . . . other than to the natural gas or electrical system of the City of Fort Morgan." *Sterling Beef*, 810 F.2d at 962.

In holding that the enactment of the ordinance was protected state action, this court relied largely on Colo.Rev.Stat. § 31-15-707(a)(1) which granted municipalities the power:

> [t]o acquire . . . gasworks, and gas distribution systems for the distribution of gas of any kind . . . or to authorize the erection, ownership, operation, and maintenance of such works and systems by others.

We held that that statute, along with "the related powers of the city provided by the state constitution and by statute on this same subject combine to detail all the powers necessary to permit the city to attain a monopolistic position as to gas distribution." *Sterling Beef*, 810 F.2d at 964. The challenged ordinance was "a forseeable consequence of the municipality's power over natural gas distribution." *Id.*

Similarly, Denver's challenged rules and regulations governing shuttle bus services are a foreseeable consequence of its statutory power to regulate access to and use of the airport. *See also Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9, 13 (1st Cir.1987) (statutes permitting Port Authority to "contract with any person . . . desiring the use of any part of [the] airport rates or charges for such use . . . " authorized policies governing "which

airlines are to use which terminals, where and how they are to be serviced, and whether or when they can taxi from one terminal to another"); *Commuter Transp. Sys., Inc. v. Hillsborough City Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir.1986) ("The Authority was authorized by the state to negotiate contracts with businesses as it may deem necessary for the development and expansion of the airport and to grant concessions, upon such terms and conditions as it shall deem proper. It is clear that The Authority's actions [restricting the number of contracts with limousine operators] was contemplated by the state legislature and under *Parker*, The Authority is immunized."); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 96 (2nd Cir.) ("In view of this broad statutory authority to enter into exclusive or non-exclusive contracts, it was a forseeable result that the Town would assert the authority to deny appellant year-long operating rights."), *cert. denied*, 479 U.S. 872, 107 S.Ct. 248, 93 L.Ed.2d 172 (1986); *Indep. Taxicab Drivers' Employees v. Greater Houston Transp. Co.*, 760 F.2d 607, 610 (5th Cir.) ("While the [statutory] provision falls short of expressly mentioning the establishment of ground transportation services, the statute's broad phrasing is a strong indication of the state's desire to abdicate in favor of municipal prescience with regard to airport management."), *cert. denied*, 474 U.S. 903, 106 S.Ct. 231, 88 L.Ed.2d 230 (1985); *Hillman Flying Serv., Inc. v. City of Roanoke*, 652 F.Supp. 1142, 1145-46 (W.D.Va. 1987) (statute granting municipalities the authority to "acquire, construct, maintain, and operate airports and related structures, properties and facilities"

immunized grant of the exclusive right to sell aviation fuel to one vendor), *aff'd*, 846 F.2d 71 (4th Cir. 1988).[11]

---

[11] Defendants also rely on our opinion in *Pueblo Aircraft Serv. v. City of Pueblo*, 679 F.2d 805 (10th Cir.1982), *cert. denied*, 459 U.S. 1126, 103 S.Ct. 762, 74 L.Ed.2d 977 (1983), in which we held that the city of Pueblo, Colorado was immune from antitrust liability in its dealings with fixed base operators at its municipal airport. We did so in reliance upon Colo.Rev.Stat. § 41-4-101, upon which defendants in this case also rely, and which, as indicated above, states that the maintenance and operation of airports are "public governmental functions, exercised for a public purpose, and matters of public necessity." While noting that typically a municipal airport is properly viewed as a "proprietary" activity, in the face of an explicit statute such as section 41-4-101, we felt compelled in *Pueblo Aircraft* to recognize immunity for the operation of the Pueblo airport as a "public governmental function."

We do not base our finding of immunity in this case on that statute or on the rationale of *Pueblo Aircraft*. The distinction between proprietary activities and governmental functions upon which our *Pueblo Aircraft* opinion was based has at times formed the basis for determinations of immunity. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) (Burger, C.J., concurring) (state authorization necessary for immunity because defendant municipalities in that case were engaged in "proprietary" activities); *Padgett v. Louisville and Jefferson County Air Board*, 492 F.2d 1258 (6th Cir.1974) (Air Board's award of contract to one taxicab company immune from antitrust challenge because Board "was exercising a valid governmental function to which the antitrust laws do not apply"); *E.W. Wiggins Airways, Inc. v. Mass. Port Auth.*, 362 F.2d 52 (1st Cir.) (decision by Port Authority to enter into exclusive lease with fixed base operator was immune from antitrust challenge as "the exercise of a valid governmental function"), *cert. denied*, 385 U.S. 947, 87 S.Ct. 320, 17 L.Ed.2d 226 (1966). It appears to us that the distinction between proprietary and governmental functions has not been

(Continued on following page)

Plaintiffs make much of the fact that in this case, the City is also in some sense a competitor of plaintiffs.[12] They also suggest that the City's activities here go far beyond what may have been authorized by statute with respect to airport parking, and that the defendants' motivations may have been anticompetitive. None of these arguments persuade us that the City should be subject to antitrust liability for its actions in this case.

(Continued from previous page)

pursued in recent Supreme Court opinions. In *Hallie*, for example, the Court simply considered whether the relevant statutes contained the requisite clear and express authorization. It did not consider whether the city's actions were proprietary or governmental. *See also* P. Areeda & H. Hovencamp, *Antitrust Law*, ¶212.2e (Supp.1990) (in criticizing Chief Justice Burger's position in his *Lafayette* concurrence, the authors noted that "decisions since *Lafayette* have essentially ignored any distinction between proprietary and other functions"); *In Re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568, 583 (N.D.Cal. 1981) ("municipal antitrust liability does not turn on the distinction between commercial/proprietary and governmental activities. . . . If the opinions in *Lafayette* make anything clear, it is that this distinction was unacceptable to eight of the nine members of the Court."), *aff'd*, 693 F.2d 84 (9th Cir.1982), *cert. denied*, 462 U.S. 1133, 103 S.Ct. 3114, 77 L.Ed.2d 1368 (1983). *Cf. City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 1351, 113 L.Ed.2d 382 (1991) (no conspiracy exception to state action immunity, with possible exception of when state acts "not in a regulatory capacity but as a commercial participant in a given market").

[12] Plaintiffs shuttle buses and the City's SMART buses do not, however, perform identical services. As the district court found, SMART buses perform the additional job of transporting passengers between concourses, and not just to remote parking lots.

The fact that the City is also in some sense a competitor of plaintiffs does not alter the basic test for state action immunity nor does it diminish the City's regulatory authority over the Airport and plaintiffs' activities. The question remains whether there is a clear and express state policy to displace competition with regulation and authorizing the challenged activities. We have held that there is. The City's additional status as a possible competitor, or its possible engagement in a "proprietary" activity, is not determinative. *See* note 11, *supra*. *Cf. City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. at 1351 ("this [state action] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market").

Similarly, plaintiffs' allegation that defendants may have gone beyond the statutory authority granted them, or that they may have been motivated by anticompetitive intentions, is unpersuasive. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991). As we noted in *Buckley Constr., Inc.*, 933 F.2d at 856, "[o]nce a municipality establishes it is entitled to state action immunity, the subjective motivation of the actors involved in the decisionmaking process should not come into play." We agree with the Ninth Circuit, which has stated:

> The availability of *Parker* immunity . . . does not depend on the subjective motivation of the individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it. This must be so if the state action exemption is to remain faithful to its foundations in federalism and state sovereignty. A contrary conclusion would compel the

> federal courts to intrude upon internal state affairs whenever a plaintiff could present colorable allegations of bad faith on the part of defendants.

Boone v. Redevelopment Agency, 841 F.2d 886, 892 (9th Cir.), *cert. denied*, 488 U.S. 965, 109 S.Ct. 489, 102 L.Ed.2d 526 (1988) (quoting *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir.1985)); *see also Omni Outdoor Advertising, Inc.*, 111 S.Ct. at 1352-53. For the same reason we reject the argument that alleged errors or abuses in the implementation of state law should expose the City to antitrust liability. *See Omni Outdoor Advertising, Inc.*, 111 S.Ct. at 1349-50; *Buckley Constr., Inc.*, 933 F.2d at 856; *Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9, 13-14 (1st Cir. 1987); *Llewellyn*, 765 F.2d at 1334; *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir.1984), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1864, 85 L.Ed.2d 158 (1985); P. Areeda & H. Hovencamp, *Antitrust Law*, ¶212.3b (Supp.1990); *cf. Lease Lights, Inc. v. Pub. Serv. Co. of Oklahoma*, 849 F.2d 1330, 1334 (10th Cir.1988) ("The constitutional invalidity of the attempted state regulation is not an appropriate basis for disregarding state action immunity."), *cert. denied*, 488 U.S. 1019, 109 S.Ct. 817, 102 L.Ed.2d 807 (1989).

We therefore reverse the district court's conclusion that defendants' activities were not immune from antitrust challenge. Accordingly, we need not address the merits of the antitrust claims.

II. *Equal Protection and Due Process Claims.*

Plaintiffs claim that the City created three different classifications of shuttle bus services: plaintiffs' private

off-airport parking shuttle bus service; hotel, motel, ski resort and other comparable facility shuttle bus service; and SMART shuttle bus service. The evidence showed, and the district court found, that the challenged rules and regulations imposed on plaintiffs a fee which was 50% higher than the fee imposed on the hotel, motel and ski resort shuttle bus services. SMART buses were assessed no fee. Plaintiffs claim that this disparate treatment of similarly situated shuttle bus services was arbitrary and capricious and violates the equal protection and due process clauses. The district court rejected this argument, concluding that the City had a rational basis for treating the three groups differently. We affirm.

When a plaintiff challenges economic or commercial legislation as violating the equal protection or due process clauses, the state or municipal defendant need only show that the regulation is rationally related to a legitimate state interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976) (per curiam); *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934); *Buckley Constr., Inc.*, 933 F.2d at 859; *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367 (11th Cir.1987), *cert. denied*, 484 U.S. 1063, 108 S.Ct. 1022, 98 L.Ed.2d 987 (1988); *Murphy v. Matheson*, 742 F.2d 564 (10th Cir. 1984). Governmental bodies have "wide latitude in enacting social and economic legislation; the federal courts do not sit as arbiters of the wisdom or utility of these laws." *Alamo Rent-A-Car, Inc.*, 825 F.2d at 370; *see also Silverstein v. Gwinnett Hosp.*

Auth., 861 F.2d 1560, 1564 (11th Cir.1988); *Murphy v. Matheson*, 742 F.2d at 575. We also note we need not satisfy ourselves that the challenged rules will in fact further their articulated purposes; it is sufficient if "the legislature could rationally have concluded that the purposes would be achieved." *Alamo Rent-A-Car*, 825 F.2d at 372 (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981)); *see also Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508 (1982) ("Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them."); *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 255-56 (3rd Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1127, 107 L.Ed.2d 1033 (1990).

We consider first whether the challenged classifications have a legitimate purpose. The challenged rules and regulations state that they were enacted "to ensure the traveling public access to an efficient and orderly ground transportation system and to ensure efficient use of the limited capacity of Airport roadways and parking and loading facilities;" to "meet the needs for operating the Denver Municipal Airport System including without limitation the expenses for bonded indebtedness of the system, its operating expenses, and expenses for construction, reconstruction, replacement, repair and any similar activity for any facility within the system;" "to retire debts" and to "pay for Airport construction, reconstruction, replacement, repair and operating expenses;" to "reasonably apportion these expenses among concessionaires, businesses and other users of the facilities;" and "to recoup revenue the Airport may be losing and

preserve its existing revenue." These are legitimate governmental purposes. *See Alamo Rent-A-Car*, 825 F.2d at 373 (raising revenue is a legitimate and substantial governmental objective); *Gannett Satellite Information Network v. Metro. Transp. Auth.*, 745 F.2d 767 (2d Cir.1984); *Astro Limousine Serv., Inc. v. Hillsborough County Aviation Auth.*, 678 F.Supp. 1561, 1565 (M.D.Fla. 1988), *aff'd*, 862 F.2d 877 (11th Cir.1988). Promoting the efficient use of Airport space and facilities is undoubtedly a legitimate governmental purpose.

Accordingly, we must determine whether there is a rational basis for believing that the classifications employed will further those legitimate purposes. There are two relevant comparisons here: plaintiffs vis-a-vis hotel, motel and ski resort shuttle bus operators and plaintiffs vis-a-vis SMART buses. We consider first the different treatment of plaintiffs and hotel, motel and ski resort services.

Plaintiffs argue there is no rational basis for charging them a fee 50% higher than the fee imposed on those other shuttle bus operators, whose use of the Airport, plaintiffs argue, is identical. The district court found that plaintiffs' shuttle bus service is "different" from the service provided by buses connecting the Airport with hotels, motels and ski resorts. Defendants argue and the district court also found that plaintiffs derive a "greater benefit" from the Airport than do hotel/motel/ski resort shuttle bus services. Plaintiffs contend it is irrational to make such an assumption without engaging in studies to prove the greater benefit. We disagree.

A very similar contention was made in *Alamo Rent-A-Car*, 825 F.2d 367 (11th Cir.1987), where an off-airport car rental company challenged the imposition of higher user fees on its own operations than on hotel and motel courtesy vehicles. The court held such different fees did not violate the equal protection clause:

> Differences in the types of business conducted by these companies is certainly a factor in equal protection analysis, and in some cases this distinction alone may be sufficient to uphold the challenged legislation.

Alamo Rent-A-Car, 825 F.2d at 370. Even assuming the businesses were not materially different for the purpose of imposing the challenged fees, the court concluded that "[t]he distinctions . . . drawn are based upon [the Airport Authority's] rational assessment of the relative benefits and the extent of use of each category of vehicles that enter the airport. In establishing these classifications, the Authority need not achieve perfection or mathematical exactitude." *Id.* at 371.[13] *See also Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979). We reach the same conclusion here.

We review the district court's factual findings under the clearly erroneous standard. *Woods v. North Am. Rockwell Corp.*, 480 F.2d 644, 646 (10th Cir.1973). We cannot say

---

[13] For example, the court noted that the Airport Authority could rationally conclude that hotel and motel operators would discontinue service if they were charged any higher fee, since the airport courtesy vehicle service is not an indispensible part of their business.

that the findings that plaintiffs are engaged in a "different" service and that they derive a "greater benefit" from the Airport are clearly erroneous.[14] Given those findings, there is a rational basis for believing that the different treatment of plaintiffs' service compared with other shuttle bus services furthers the City's legitimate interests of "reasonably apportion[ing] [airport] expenses among . . . users of the facilities" and "ensur[ing] the traveling public access to an efficient and orderly ground transportation system." *See Alamo Rent-A-Car,* 825 F.2d at 370-71.

Plaintiffs also challenge the imposition of fees on their services as compared with the exemption from any fees of the City's own SMART vehicles. We also affirm the district court's conclusion that there is a rational basis for believing that this distinction will further the City's legitimate interests. As the district court specifically found, SMART buses perform additional functions in that they also transport passengers between concourses. Thus, SMART buses are arguably engaged in a "different line[ ] of business." *Alamo Rent-A-Car,* 825 F.2d at 370.

---

[14] As a further explanation for why it concluded that plaintiffs derive a greater benefit from the Airport, the district court noted that "[t]he plaintiffs clearly wouldn't be in business at all but for this airport, and their whole business is to provide the parking services for people explaning at this airport." Transcript of Ruling of the Court at 19-20. Shuttle bus services to hotels, resorts and ski resorts, by contrast, would still be in business even if the Airport, for example, banned all private shuttle bus services from the premises. Although they could not pick up passengers at the Airport, they could still provide a service to people travelling to hotels, motels or ski resorts, albeit from a different pick-up location.

Furthermore, the City as a governmental entity can be treated differently for equal protection purposes than a private commercial entity. *See Puget Sound Co. v. City of Seattle*, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025 (1933); *see also City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974).[15]

Finally, as defendants argue, they could rationally conclude that SMART buses should be exempt from the fee because the City already receives substantial revenue from the City's parking operations at the airport. Thus, no equal protection violation follows from the decision not to impose an additional user fee on the City's parking lot shuttle service. *See Evansville-Vanderburgh v. Delta Airlines*, 405 U.S. 707, 718-19 and note 13, 92 S.Ct. 1349, 1356-57 and note 13, 31 L.Ed.2d 620 (1972).

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of defendants' Rule 41(b) motion to dismiss.

---

[15] Additionally, as airport officials testified, defendants believed that it would be illogical to charge SMART buses the user fee because there would be no net gain of funds. Rather, the fee would be paid out from one part of the City's operations and paid into another. Exempting SMART buses from the fee is therefore consistent with the legitimate governmental objective of raising revenue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ALLRIGHT COLORADO, INC., Plaintiff	)	
vs.	)	89-M-1071
CITY AND COUNTY OF DENVER, ET AL., Defendant.	)	

RULING OF THE COURT
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge, for the District of Colorado, beginning at 9:00 a.m. on the 22nd day of November, 1989, in Courtroom A, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:	Richard Shearer, Esq. Scott Myren, Esq. Calkins, Kramer, Grimshaw & Harring 1700 Lincoln Street, Suite 3800 Denver, Colorado 80203
For the Defendants:	Helen Eckardt Raabe, Esq. Dean Speirs, Esq. Assistant City Attorneys Stapleton International Airport Room 406, Main Terminal Bldg. Denver, Colorado 80207

B. Lawrence Theis, Esq.
Walters & Theis
2015 York Street
Denver, Colorado 80205

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

PROCEEDINGS

THE COURT: I'm ready to rule on the matter and I'm going to grant the defendant's motion. Under Rule 41(b), in doing so it's necessary for me now to find the facts and make the conclusions of law, just as if the trial had been completed.

The basic facts in this case, of course, essential facts are not really disputed in terms of what has happened here. The matter at issue concerns the Stapleton International Airport, which is operated – owned and operated by the City and County of Denver and as a part of that airport facility, the city provides parking service as a necessary service for air travelers.

It's clear from the evidence that as Stapleton Airport grew, the on-site parking facilities provided there became inadequate to the volume of traffic, and it's clear that Allright saw the opportunity that was presented by that situation to open up an off-site private parking facility several miles away, and provided shuttle bus service from that parking lot to the airport for enplaning and deplaning passengers so they could be transported from the parking lot to the airport and reverse.

The history of the shuttle parking business is set out in the plaintiff's expert's report here, which is Exhibit

100, Mr. Coddington's report and in his testimony, and rather than prolong the findings of fact I'm going to simply incorporate by reference the relevant portions of that exhibit.

The Section 1, development of parking at Stapleton International Airport, I accept as being accurate with respect to when these other facilities came on line and when Stapleton Airport's shuttle lots were also established in their capacities. Also, for purposes of this legal analysis, I'm going to accept the other portions of that report dealing with the volume of the parking business and particularly the figures that are attached, Figure II-1 and II-2, and also the table II-1.

What that shows, of course, is an increase of growth in the market and for the purposes of all of the necessary analysis of the claims in this case, the market being talked about is the airport, Stapleton International Airport shuttle parking services. That's really both geographical and product definition or service definition, Stapleton Airport shuttle bus parking. And it shows, particularly Figure II-2, graphically the growth of that market over time, with some leveling off, of course, which is also, according to the testimony, coincident with a reduction in passenger flow at Stapleton International Airport.

There is also in the report and in the testimony of Mr. Coddington the testimony with respect to the impact on the plaintiff's business, and Figure II-5 is his illustration of his analysis of the effects of the expansion by the city of the Smart lots, the operation of the Smart shuttles and, I suppose, also, the pricing strategies of the city. And of course, the pricing strategy included its coming into the

market at a significantly lower price than the competitors, and then its current pricing.

Now, the city has in the past charged the plaintiffs a fee of – a monthly fee of $30 a vehicle, which hasn't been complained about by the plaintiffs and has been accepted, I guess, as a fair charge for access. But the city, in adopting through the Department of Public Works its new policies and the rules and regulations that are now in evidence as Plaintiff's Exhibit 44, has significantly changed the rules for access by the plaintiffs. They've also changed the rules for access by others in commercial traffic, but the focus of this lawsuit, of course, is on the plaintiffs as the parking lot operators, remote parking lot operators who provide shuttle bus services.

The principle thing in the regulations that were focused on here are the fees for parking lot operators, which are at page 100101, using the Beta or whatever it's called, page-numbering system here, which is Class 1 vehicles, 42 cents for the first 15 minutes with a charge of $1.13 for each additional ten minutes. That's the classification applicable to the plaintiff's shuttle vehicles. And of course, there are other vehicle classifications in here with different rates. It's also, according to the evidence now, the situation that the vehicles operated by the city through its management contract would be a Class 3 vehicle because of its different size and that if that were a private company, it'd be charging $1.35 for 25 minutes and $2.63 for additional ten minutes.

Additionally, as a requirement under those rules and regulations, the plaintiffs are required to enter into a

permit agreement identified as a non-tenant parking company permit, a copy of which is Plaintiff's Exhibit 42, and the requirements there are something that the plaintiffs had no choice about if they choose to conduct their business as it is, as it has been. They have to sign this agreement, like it or not.

It's also clear that in looking at the other charges in Exhibit 44, that those other commercial vehicles who are involved in using the same commercial lane at the lower level of the airport terminal building, the drive lanes, are charged the Class 1 vehicles and the classifications are the same here by length of the vehicle – 28 cents for the first 15 minutes, 75 cents for each additional ten minutes for Class 1 vehicles, the same class as the plaintiffs. So the plaintiffs are paying, or being required to pay 50 per cent more than the other commercial users of the same access lanes.

It's also in the evidence that there are some 240, approximately 240 different companies making use of these commercial lanes and they represent a variety of enterprises which include vans running people up to ski resorts and other places. They include limousine service. They include rental car shuttles; that is, shuttle buses to take people to rental car facilities; couriers, and a number of other users.

Now, the plaintiffs' challenge to the regulations and the permit agreements come in several different claims. The plaintiffs assert a violation of Section II of the Sherman Act. The plaintiffs assert that the regulations and fees are invalid as an unreasonable burden on interstate

commerce, that the fees and regulations violate the plaintiffs' property rights in contravention of the due process and equal protection clauses of the 14th Amendment, that there's been a usurpation of legislative power in the city by an administrative agency, that these contracts are permit agreements or contracts of adhesion that are contrary to the law of the State of Colorado, and that the fees amount to an excise tax which must be under the charter of the City and County of Denver enacted by legislation with the City Council. The claims must each be analyzed separately. I do not agree with the contention made by the plaintiffs, both here in argument and in the plaintiffs' brief in opposition to the motion for summary judgment that these are inextricably linked alternative and concurrent claims under the federal antitrust laws and the equal protection, due process and commerce clauses.

I don't agree with that because that's just not the way in which the Court must function. It's not appropriate for a Court to simply meld together a number of different legal doctrines and say that under this aggregation of claims the plaintiffs have some new claim not previously recognized in the law. I think that's the principal problem with the analysis in the Park-N-Fly of Texas case, that in reading that Court's opinion, it's difficult for me to understand whether the result is bottomed in equal protection, due process, or exactly what doctrine other than the conclusory paragraphs which say, essentially, you ought to settle this matter.

Now, I think it's important to emphasize the need to give discrete evaluation of each claim for relief because it does say something about what is the proper institutional role of the Court in any controversy. If we were to blur

the distinctions that are made in the law in these various claims, we are, of course, doing that which Courts have been criticized for, federal courts in particular, that they're stepping outside the institutional role and sort of putting some sort of visceral standards of fairness into play as rules of the game. That's not right. I have to analyze the claims and exercise the power of this Court in accordance with well-established legal principles.

We begin, then, with the antitrust claim under the Sherman Act. A Sherman II violation requires proof of the elements that are mentioned on page six of the defendant's memorandum supporting the motion to dismiss that claim. Here there is a relevant market. I've already alluded to it as the Stapleton Airport parking shuttle service which, as I've already said, includes both geographic limitations and product or, in this case, I think more appropriately, service in which the alleged attempt occurred.

There is also a case made for the fourth element, conduct in furtherance of an attempt to monopolize, and that, of course, refers not only to the plaintiffs' evidence concerning the fact that the City and County of Denver does not charge itself in its Smart role the same fees that would be required of another Class 3 user, or even considering itself a Class 1 user as the plaintiffs are, commercial users. So the plaintiffs contend, and the evidence supports that in that sense, the defendants have an economic advantage. It's also true that there is a significant difference with respect to the route followed by the Smart shuttles and the plaintiffs' shuttles as they're restricted, and particularly as it affects the red zone, the pickup which requires shuttles to leave the airport, go down and

then return, go through another access gate, I guess it is, pick up passengers and go back. So there's a doubling back which both affects the time, the convenience of the passengers, and the costs to the plaintiffs of running those shuttles.

There's also evidence supporting that the door, the locations for the pickups favor the Smart buses, particularly given the difference in volume here with respect to the doors that are in between the north and south pickup zones that the plaintiffs can use.

The failure of the claim under Sherman II is the failure to show that there's a dangerous probability of success to monopolizing any relevant market and the failure to prove specific intent to monopolize. Now, there's a difference between an intent to monopolize and an intent to use certain advantages that a competitor has, and here we must draw the distinction clearly between applying the law of antitrust to the City and County of Denver as a competitor with the plaintiffs and governmental action by the City and County of Denver.

I have disagreed with the City's contention that it's immune from this claim under the Parker v. Brown governmental immunity or exemption doctrine. There is no doubt in my mind that the operation of Stapleton International Airport given as a whole is something that's approved by the State of Colorado under state policy. The policy of this state authorizes cities and counties – and Denver is both – to run an airport, and there's no doubt in my mind that for a number of purposes, the Parker v. Brown applies to Denver and the airport. I don't think that the doctrine is dependent upon – the application of

the doctrine is dependent upon looking at Denver as a proprietary action – in its proprietary capacity as compared with its governmental capacity, and I think the Supreme Court of Colorado stated very effectively in Denver v. Mountain States Telephone & Telegraph Company in the 1988 en banc decision at 754 Pacific 2d 1172 that – and particularly at 1173 – that the governmental proprietary distinction is neither a single nor a simple rule. It's a cluster of rules used in diverse contexts for a variety of purposes, and the Court criticizes the use of the doctrine as some general proposition, and I agree with that.

The point is simply this: That there is nothing in state policy that says to an airport operator, a governmental airport operator that you should regulate the airport parking shuttle services in any way, or that you should displace competition with regulation, and that's what the doctrine's bottomed in and there just isn't any such as it applies to this narrow aspect of the operation of the airport. So it is in that focus that I disagree with the city's contention of immunity.

Now, at the same time, it seems to me that for purposes of the antitrust analysis Denver is a player on the board, as any private operator of an airport would be. So you look to the – Denver's activities here for purposes of, first of all, the specific intent to monopolize, which is not shown in this record; and the dangerous probability of success in monopolizing, and I need only look to – on that latter one, the dangerous probability of success – to the plaintiffs' own expert's testimony, Coddington, and indeed, to the history of Denver's market entry here, that Denver, under these practices, is not going to be able to

drive the plaintiffs out of business and, additionally, there is no sufficient evidence to establish that Denver's purpose in these rules and regulations and in this permit agreement to drive the plaintiffs out of business. Indeed, it would be irrational for Denver to do it given the need for Denver in its total operation of the airport to provide parking services beyond its own capacities as they exist. I mean, as the plaintiffs have pointed out, there's a benefit to the city as the airport operator in the plaintiffs having this business out – these businesses out there and providing this service to the flying public.

Now, the evidence does not establish that Denver is a monopolist here and in this aspect of the analysis, it is important, I think, to bring in the limitations on what Denver can do as a government, so in this sense there is a necessity, I think, to overlap the principles and recognize that Denver can't be a monopolist and, as I said in colloquy with plaintiffs' counsel, Denver doesn't claim and certainly doesn't have the power to simply preclude the plaintiffs from accessing this airport by saying, "We are going to be the exclusive shuttle parking services provider for Stapleton International Airport." It can't do that because of other limitations on it as a government, which, of course, involves the concepts in these other claims.

So in a very real sense, here I have to accept the plaintiffs' view that there is a confluence of principles because they can't become a monopoly in that way, and additionally, as we'll see in a moment, they can't use their ability to extract charges as conditions for the entry here to an extent that is unreasonable; in other words, there are limits to the rates that they can charge, the fees for access and they're the very limits that are being claimed

in the other claims for relief, and that's another reason why the city can't be in the position of a monopolist with respect to this service in this market. Therefore, the plaintiffs have failed to prove a Section II, a Sherman II violation in this case.

The second claim for relief that I wish to address in the order in which I am addressing them is the plaintiffs' contention that this is a violation, the permit agreement and the fee system is a violation of the United States Constitution with respect to imposing a burden on interstate commerce. Interstate commerce is, of course, involved in this case. There's no doubt about that, and the analysis of this claim is directed by the Supreme Court opinion in Evansville Airport against Delta Airlines.

That opinion is instructive in a number of ways. There the Supreme Court said, at page 714 of the opinion as it's reported in 405 U.S. Reports, "We regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike." Going on, "The facility provided at public expenses aids rather than hinders the right to travel. A permissible charge to help defray the costs of the facility is, therefore, not a burden in the constitutional sense."

The Court goes on to discuss what is permissible, and page 707 refers to its decisions concerning highway tolls wherein it was recognized that states could develop uniform, fair and practical standards for this type of fee and

then the opinion goes on to discuss toll – types of toll charges that have been invalidated and those that have been validated, which include some rather unusual ones including a 2 per cent charge on the fair market value of motor vehicles used in commerce. And the Court further notes that the tax should – tax as it was in the toll cases – should be judged by the result, not the formula, and must stand unless proven to be unreasonable in amount for the privilege, the privilege granted.

It goes on to cite an earlier case that talks about rough approximation rather than precision, and says at 716: "Thus, while state or local tolls must reflect a uniform, fair and practical standard relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern, at least so long as the toll is based on some fair approximation of use or privilege for use as was that before us in Capital Greyhound and is neither discriminatory against interstate commerce, nor excessive in comparison with the governmental benefit conferred. It will pass constitutional muster even though some other formula might reflect more exactly the relative use of the state facilities by individual users."

Now that, as I say, is instructive here because Mr. Moss has presented his analysis the there is really no question, I think, that if you adopted the – his view, the charge would be significantly less. He said 22 cents based on his analysis of the city's costs of the – providing this lane that the plaintiffs use. He didn't testify under generally accepted accounting principles, but I suppose maybe there aren't any for this particular type of application. I don't know. We may learn that in other litigation.

However, looking at it – and we don't have to look at it in generally accepted accounting principles, I accept that, looking at it in terms of what's fair, what's reasonable in making this decision. Now here I think, too, it's important to recognize the limits of the Court's role because we could adopt – running with this language – a standard of well, it's – you know, and also, it's what's reasonable. I guess everything that's not unreasonable is reasonable, and everything that's not arbitrary is fair because the words we use for the two sides of the coin are just those words; arbitrary on the one side, fair on the other. Reasonable on one side, unreasonable on the other, and the plaintiffs' got the burden of proof, of course, so we're really looking at whether we're talking about arbitrary and unreasonable charges.

We can look at that and do this type of cost accounting that Mr. Moss offered, and then it seems to me the Courts, under that doctrine, are going to be exercising the same kind of a role as a public utility commission in saying, well, you've got to justify by cost analysis every fee that you charge in this type of application. There is disagreement about what are true components. What's an appropriate component of cost when you're talking about a facility as large, as inter-related and as expensive as this airport?

So we can quarrel about components of costs. I support, you know, it maybe somewhat easier to say landside versus the airside here and deal with the landside costs, although I'm not so sure that that should be required because there is the inter-relationship, obviously, if we look at it in terms of the benefit conferred because if it weren't for the airside, we wouldn't be out there. Planes

wouldn't be out there. The whole facility wouldn't be out there. So components of costs are areas in this analysis, they're areas of dispute as well as the amounts and the accounting system used, and I believe it would put us into a very dense thicket, indeed, if we were to involve the Court in making careful analysis of components and amounts as Mr. Moss has.

It seems to me what the Supreme Court of the United States has said in Evansville Airport is, "Dont get involved in that. Rough approximations. Reasonable relationships. And leave these determinations for the governmental entities that are involved, and simply evaluate their conduct under a more generalized standard. Is it arbitrary? Is it unreasonable?" Now here again there is some blurring into the equal protection analysis and the equal protection claim.

The plaintiffs assert and have in Mr. Shearer's argument that the equal protection – and I believe he said equal protection and due process clauses require that people similarly situated must be treated uniformly. That isn't the law. It's not the law under the equal protection clause. It's not the law under due process. Government – these are limitations on governmental power and these limitations recognize an area of discretion for governments.

What the equal protection clause requires is that when you make classifications there has to be a rationale basis for the classification, so long as there's no invidious discrimination and, of course, this case doesn't involve the plaintiffs as a class being identified in some way with the kinds of things that would make discrimination or

classification of them prohibited on some other constitutional ground. I mean, that it's race, religion or any of those things that are prohibited. So it's a rational basis test.

Now, there are two comparators here. One is – as groups. One is the plaintiffs as the off-site parking lot operators against Smart, the city. The other is the plaintiffs against the other 250 companies, the limousines, the vans, the rental cars, shuttles and the like, and whether the city's treatment of these classes differently is supported by some rational basis.

Here we have, first of all addressing the city as the comparator, the city's Smart facility functions differently from the plaintiffs'. That's been shown in the evidence. The shuttle facilities of Smart are used for more than parking in Lots 2 and 3. They are used to transport persons from – to concourses and from one concourse to another, including the remote concourses, I guess, A+ or whatever it's called, and I think one other maybe, but at any rate, the Smart shuttles are doing more than taking people to the city's remote parking lots.

Also, the – I think law doesn't say that the, under the equal protection analysis, that the city has to treat itself the same by imposing some charge on itself and then recovering it. I mean, moving money from one pocket to another seems not rational. So I don't consider, while they are competing in terms of customers with each other, they are certainly in different categories in who they are and what they're doing.

Now with respect to the other companies, there are certainly differences here as pointed out in the course of

the testimony. As far as the – for example, the vans that take people to the ski resort areas, that's a different kind of service. The ski resort areas are there to provide an entertainment opportunity or a sports opportunity – however you want to classify it – an experience for people who want to go skiing, and that's different from providing parking for enplaning passengers at Stapleton. The same is true with respect to hotels. Much has been made here of that the hotels run shuttle services and that people are staying at the hotels who are flying in and out of Stapleton – I guess mostly in. I'm not – I don't know why people who would be leaving Denver as their home would be staying at a hotel, too, but then there are a lot of reasons for human conduct. But at any rate, the hotels seem to me to be in a different category.

The basic thing that has driven the defendant's decision in this case to make this classification is the view – and it was first expressed in this Peat Marwick study and in Hall's testimony and it's been repeated here by other witnesses, the perception that the city is subsidizing the plaintiffs, and the city's view that the plaintiffs have been at a competitive advantage over the city because it – they, the plaintiffs, don't have the burden of the costs that the city does. So what the city has done is in making the classification, analyzed this in terms of the benefit conferred and has viewed the plaintiffs, whose sole business really here – as far as it's relevant to this case at any rate – is to provide this parking service. The plaintiffs clearly wouldn't be in business at all but for this airport, and their whole business is to provide the parking services for people enplaning at this airport.

So the city has a rational basis for believing that it is conferring a greater benefit on these parking lot operators than on hotels, limousines, rental car, shuttles or the other users who come under the classification of commercial users of the lanes and who are in different – who are treated differently in Exhibit 44.

Moving on to due process, I suppose we're talking about substantive due process in the case in the sense of abuse of power, the governmental power that the city has, and I suppose you can frame it in terms of whether there is an abuse of governmental power here to enhance proprietary business of the city, if we want to do that. My answer to that is I believe the analysis must be the same as it is under the equal protection clause in terms of the – determining the reasonableness of the city's conduct, and the plaintiffs' claim fails in that the city has, of course, an interest in making Stapleton cost-effective and, indeed, in making it revenue-producing. It has a debt burden. It must meet that debt burden and I presume that the city can have a legitimate interest in having revenues in excess of costs in functioning in this way. I assume that's one of the reasons the city's in the business and, of course, we know and it's been alluded to here that the city also has the intention of replacing this facility and has an interest in obtaining revenues from the users of this facility to generate some funds useful for replacement.

But we're not here to decide what the upper limits of the city's fee structure might be. I don't know what they are. What they are is the point where they become unreasonable and arbitrary, and whatever point that is, 44 and the rates charged there aren't it. So under this – these

claims, the plaintiffs simply fail to prove a violation of the antitrust laws, deprivation of property without due process of law, or a denial of equal protection of the laws. Plaintiffs contend that permit agreement, Exhibit 42, is an adhesion contract. I don't agree. Here again, as I asked Mr. Shearer what provision in this contract would permit the total intrusion into proprietary information by the city and he cited: "The permittee further agrees to submit any report or reports or information regarding its operations hereunder that the city's Manager of Public Works or his authorized representative may request."

I leave to another day – and I hope another Court – the specific analysis of that language, but the language in that, as in any agreement, has to be viewed in the context of the whole of the agreement and if I were interpreting it under some dispute about proprietary information, I would consider what is the city's legitimate purpose in seeking information and rule in that context. So to call this an adhesion contract would be requiring me to look under the bed and to ascribe a lot of sinister purposes to the city which I'm not prepared to do. The city has to interpret the contract reasonably and with a sense of its purpose, and accordingly, I view it in that way.

Viewed in that way, all of the requirements of the permit seem to me to be reasonably related to the purpose of governing the way in which the plaintiffs can access the airport, and that includes the insurance provisions and the indemnification. This is, as the evidence shows, highly congested, a lot of people, and as one of our witnesses testified, there is a very real concern for safety, and particularly pedestrian safety at these levels. So these are, in my judgment, reasonable requirements

for the purpose of the agreement and do not sink to the level of an adhesion contract.

Now, with respect to the other state claims – and obviously by dealing with them I am exercising pendant jurisdiction because that's the only basis upon which this subject matter is before this Court, but I believe it important to do so, so that this dispute can be resolved in its entirety. The usurpation of legislative power by administrative agency I don't think holds water here. This is the operation of the airport. It's done as an executive function. We don't have, really, in analyzing the charter of the City and County of Denver, I think, the three branches of government analysis that we would put on the United States Constitution, but there's nothing been put forth here that shows to me that the conduct here by the Department of Public Works is not authorized as part of this administrative responsibility in running this airport.

And on the question of whether this is a tax as opposed to a charge for a benefit conferred, the view that I take is that it is not a tax. It's not an excise tax or any kind of a tax. It is a fee for a benefit conferred. There is a reasonable relationship to that benefit.

So on all of these claims I find for the defendant, and in accordance with these findings and conclusions, the claims are dismissed. The case is dismissed. Judgment will enter for the defendants on all claims with its costs, their costs to be recovered on the filing of a bill of costs within ten days from the entry of judgment.

Either counsel have anything further?

MS. RAABE: Nothing further, Your Honor.

MR. SHEARER: Nothing, Your Honor.

THE COURT: All right.

Court's in recess.

(Whereupon, the Court's ruling was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

November 28, 1989

/s/ Carolyn Dahl
J. Ford & Associates, Inc.
991 Ursula Street
Aurora, Colorado 80011
(303) 364-5776

CODDINGTON REPORT (PLAINTIFF'S EXHIBIT 100)
AS INCORPORATED INTO TRIAL COURT RULING,
CASE NUMBER 89-M-1071

Confidential & Priviledged

SHUTTLE BUS PARKING, STAPLETON INTERNATIONAL AIRPORT

- Market Analysis

- Impact Assessment

Prepared by

Dean C. Coddington and Kenneth E. Peterson
BBC, Inc.
155 South Madison Street
Denver, Colorado 80209
303-321-2547

Prepared for

Calkins, Kramer, Grimshaw & Harring
Suite 3800, United Bank Center
1700 Lincoln Street
Denver, Colorado 80203
303-839-3800

November 13, 1989

SECTION I. THE DEVELOPMENT OF PARKING AT STAPLETON INTERNATIONAL AIRPORT

In our view, the broad Stapleton International Airport parking market includes the main parking structure immediately adjacent to the airport, SMART and its two lots, and the four private shuttle bus parking operators – Allright, Monaco, Premier and Continental. The location of these seven parking facilities is shown on Figure I-1.

The purpose of this section of the report is to provide an overview of the broad short and long-term parking market as background for the detailed market analysis of shuttle bus parking in the vicinity of Stapleton.

Capacity of Parking Facilities in the Stapleton Area

The parking structure at Stapleton, which offers both short-term and daily rates, has approximately 5,500 parking spaces available.

The first shuttle bus parking near Stapleton was developed in 1978 by Allright Parking at its lot at Smith Road and Monaco Parkway. The lot accommodates 1,475 cars. In 1985, the owners of Allright sold this lot to Ennis, Inc.; this lot is now known as Monaco Parking. It is 1.9 miles and five minutes driving time from the main terminal (All distances and travel times were measured by BBC.)

Stapleton International Airport operated shuttle bus parking with Lot #1 from 1983 to July, 1986. Lot #1 was located in the area now used for commuter flights.

Allright Parking started a second lot, with capacity for 2,200 cars, at 4001 Quebec Street in 1982. This lot is 1.6 miles (five minutes) from the terminal.

Stapleton Airport established Shuttle Lot #2 in November, 1984; it has a capacity for approximately 2,300 cars. Lot #2 is 2.1 miles (six minutes) from the terminal.

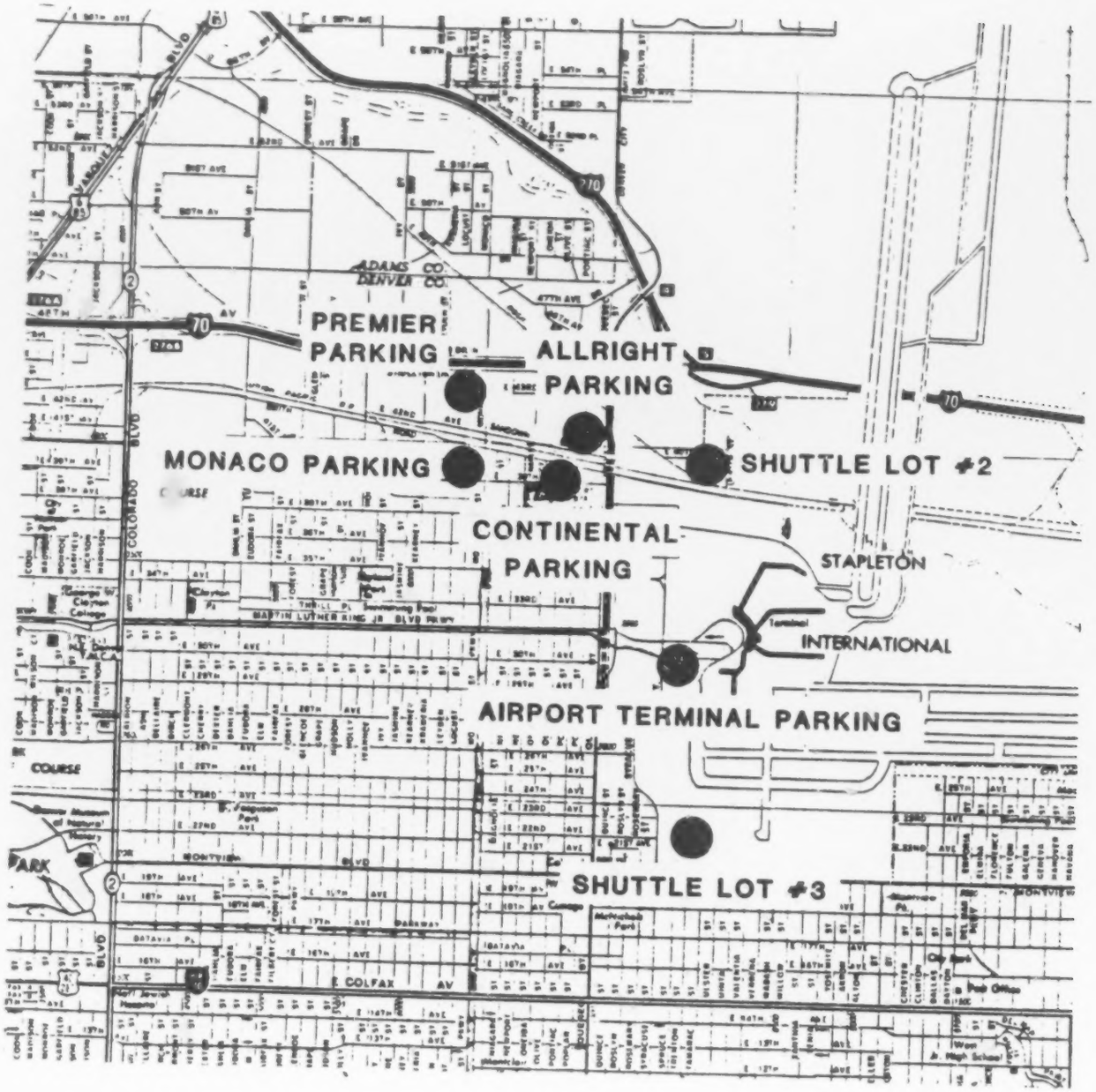
Shuttle Lot #3, established in December, 1985, has room for an estimated 4,800 parked cars, and it is 1.2 miles (three minutes) from the terminal.

The lot currently operating at 6800 Smith Road was purchased by Continental in early 1986. It is also believed to have been operated as a shuttle parking lot dating back to the early 1980s by United Investment. This lot has a capacity of 648 spaces and is 1.7 miles (four minutes) from the terminal.

Premier Parking established its lot at 4241 Monaco Parkway in January, 1986. This lot has a capacity of 433 cars, of which 333 spaces are covered. Premier is 2.1 miles (six minutes) from the terminal.

CONFIDENTIAL & PRIVILEGED

FIGURE I-1. LOCATION OF ON-SITE AND OFF-SITE PARKING, STAPLETON INTERNATIONAL AIRPORT, FALL, 1989



BEST AVAILABLE COPY

There is a limited amount of shuttle bus parking provided from time to time by other private operators such as the hotels in the vicinity of Stapleton. However, the share of the market captured by these firms is not significant, and we have not included them in our analysis.

Trends in Parking Days

At the time this report was prepared we had requested, but not received, data on parking days for the main terminal parking structure. Parking days are the number of vehicles parked per 24-hour period. Had the City provided the requested data, we would have plotted trends in parking days for the 1982 to 1989 period and calculated the share of the market for the main terminal parking facility, SMART and the four private shuttle bus parking operators.

SECTION II. THE AIRPORT SHUTTLE BUS PARKING MARKET

The previous section provided an overview of all commercial parking in and around Stapleton International Airport, 1982 to the present. This section focuses on the shuttle bus portion of the parking market. For the purposes of estimating the economic impacts of SMART on the four private operators, this is the more relevant portion of the airport parking market.

Trends in Utilization, Shuttle Bus Parking

Figure II-1 shows the trend in utilization of the four private and two SMART lots for the period 1982 through

mid-year, 1989. Figure II-2 shows the same information on a cumulative basis forecast through 1994. The projections are based upon a continuation of past trends, especially those trends established since 1987.

Prior to the opening of SMART lots #2 and #3, the rate of growth in parking days of the two privately owned lots – Allright and Monaco – averaged a combined 16.3 percent per year from 1982-85. Since the SMART lots opened in 1985, both Allright and Monaco have experienced significant declines in use. Their combined average drop from 1986-89 has been 5.2 percent per year. Looking ahead, the forecast decline in usage of the four privately-owned lots is expected to be a minus 1.5 percent per year through 1994.

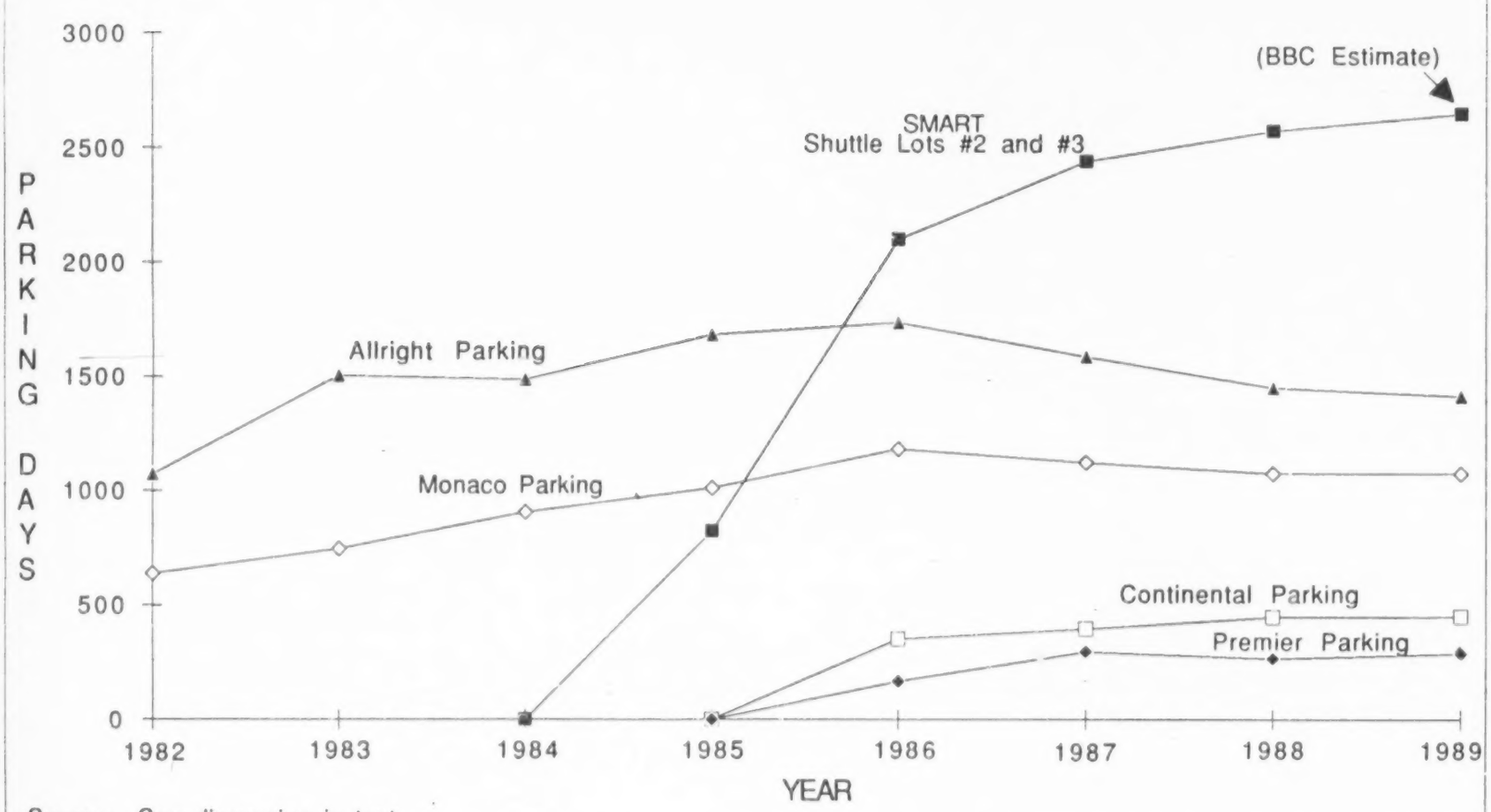
Table II-1 shows the distribution of the shuttle bus parking market from 1982-1989. (Lot #1 data are excluded from these comparisons; no data were available). In terms of market share, in 1984 the private lots had 100 percent of the off-site market. In mid-1989, the share of the market was as follows:

Parking Operator	1984	1989
SMART	0	45.0%
Allright	62.1%	24.1
Monaco	37.9	18.3
Premier	0	4.9
Continental	0	7.7
Total	100.0%	100.0%

Note: Limited shuttle bus airport parking was available at the site currently operated by Continental; however, no financial or utilization data are available about the site prior to 1986.

Looking ahead to 1994, SMART will have over half of the shuttle bus parking market and the four private operators will have a combined market share of less than 50 percent.

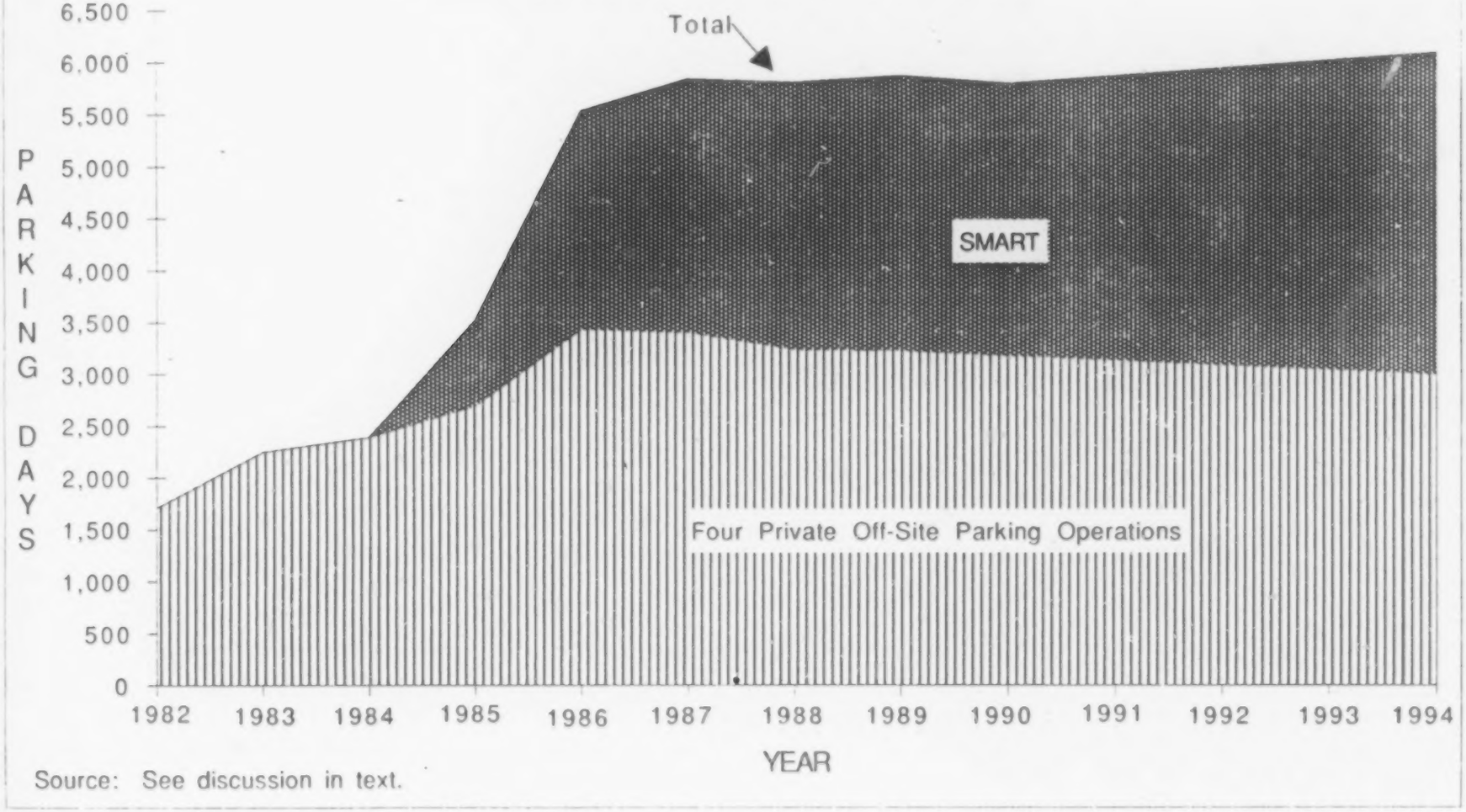
FIGURE II-1. AVERAGE DAILY PARKING DAYS, SMART AND FOUR PRIVATE OPERATORS, 1982 - 1989



Source: See discussion in text.

CONFIDENTIAL & PRIVILEGED

FIGURE II-2. AVERAGE PARKING DAYS, SHUTTLE BUS PARKING, SMART AND FOUR PRIVATE FIRMS, 1982-1989, WITH PROJECTIONS TO 1994



Source: See discussion in text.

CONFIDENTIAL & PRIVILEGED

TABLE II-1. AVERAGE DAILY PARKING DAYS AND MARKET SHARE FOR SHUTTLE BUS MARKET, 1982-89

	Allright	Monaco	Continental	Premier	Shuttle Lot #2	Shuttle Lot #3	Yearly Total
Total Parking Days							
1982	1,073	639					1,712
1983	1,504	746					2,250
1984	1,487	907					2,394
1985	1,682	1,011			547	277	3,517
1986	1,735	1,183	353	166	1,219	881	5,537
1987	1,587	1,124	397	296	1,272	1,170	5,846
1988	1,450	1,074	448	267	1,321	1,252	5,812
1989*	1,414	1,075	450	289	1,350 (BBC est.)	1,300 (BBC est.)	5,878

* 1989 represents January through September.

TABLE II-1. AVERAGE DAILY PARKING DAYS AND MARKET SHARE FOR SHUTTLE BUS MARKET, 1982-89 – Continued

	Allright	Monaco	Continental	Premier	Shuttle Lot #2	Shuttle Lot #3	Yearly Total
Total Market Share							
1982	62.7%	37.3%	–	–	–	–	100.0%
1983	66.8	33.2	–	–	–	–	100.0
1984	62.1	37.9	–	–	–	–	100.0
1985	47.8	28.7	–	–	15.6	7.9	100.0
1986	31.3	21.4	6.4	3.0	22.0	15.9	100.0
1987	27.1	19.2	6.8	5.1	21.8	20.0	100.0
1988	24.9	18.5	7.7	4.6	22.7	21.5	100.0
1989	24.1	18.3	7.7	4.9	23.0	22.1	100.0

Source: BBC; discussion in text.

Impact of Stapleton Lots #2 and #3 on Private Lots

Assuming no capacity constraints on the private lots, Figure II-4 shows a projection of demand for shuttle bus parking if SMART had not come into being as a competitor to the private lots. BBC's forecast is based upon the trend established from 1982 through 1986. This shows that the four private lots combined would have accommodated an average of 4,500 cars per day by mid-1989, or an annual average rate of growth of 7.7 percent over the past three years.

The impact of SMART of privately-owned shuttle bus parking lots is the difference between the volume of business the private lots would have been able to carry out absent competition vs. what they actually have accomplished. This is shown in Figure II-5. As a point of reference, Figure II-5 also shows BBC estimates of overall shuttle bus parking, including SMART, through 1994.

On an annual basis, the loss in parking days due to competition from SMART has been:

Year	Average Number of Daily Parking Days Lost
1985	207
1986	163
1987	496
1988	961
1989 (estimated)	1,272

In terms of revenues, assuming that each parking day lost equals $4.00 (the average price charged for open,

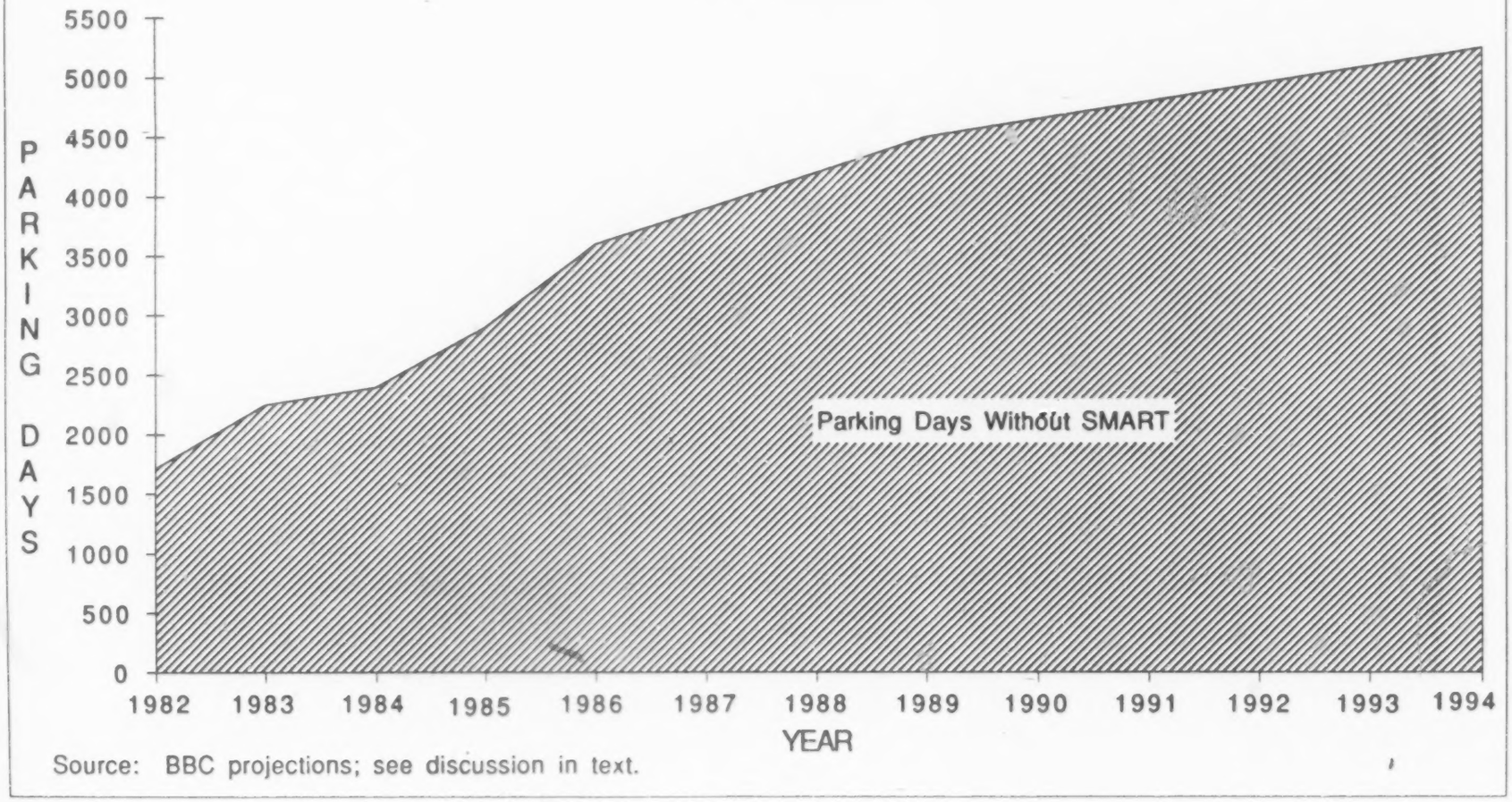
basic parking services by the private operators), total annual lost revenues for the 1985-1989 period by the private operators has been:

Year	Total Lost Revenues
1985	$302,220
1986	237,980
1987	724,160
1988	1,406,904
1989	1,857,120
Total Lost Revenues, 1985-89	$4,528,384

Conclusions on Impact of SMART on Private Shuttle Bus Parking Lots

There is no question that SMART has had a significant negative impact on the volume of business available to the four private operators, particularly Monaco and Allright. And, based upon the projections contained in Figure II-5, the losses will grow larger over the next five years.

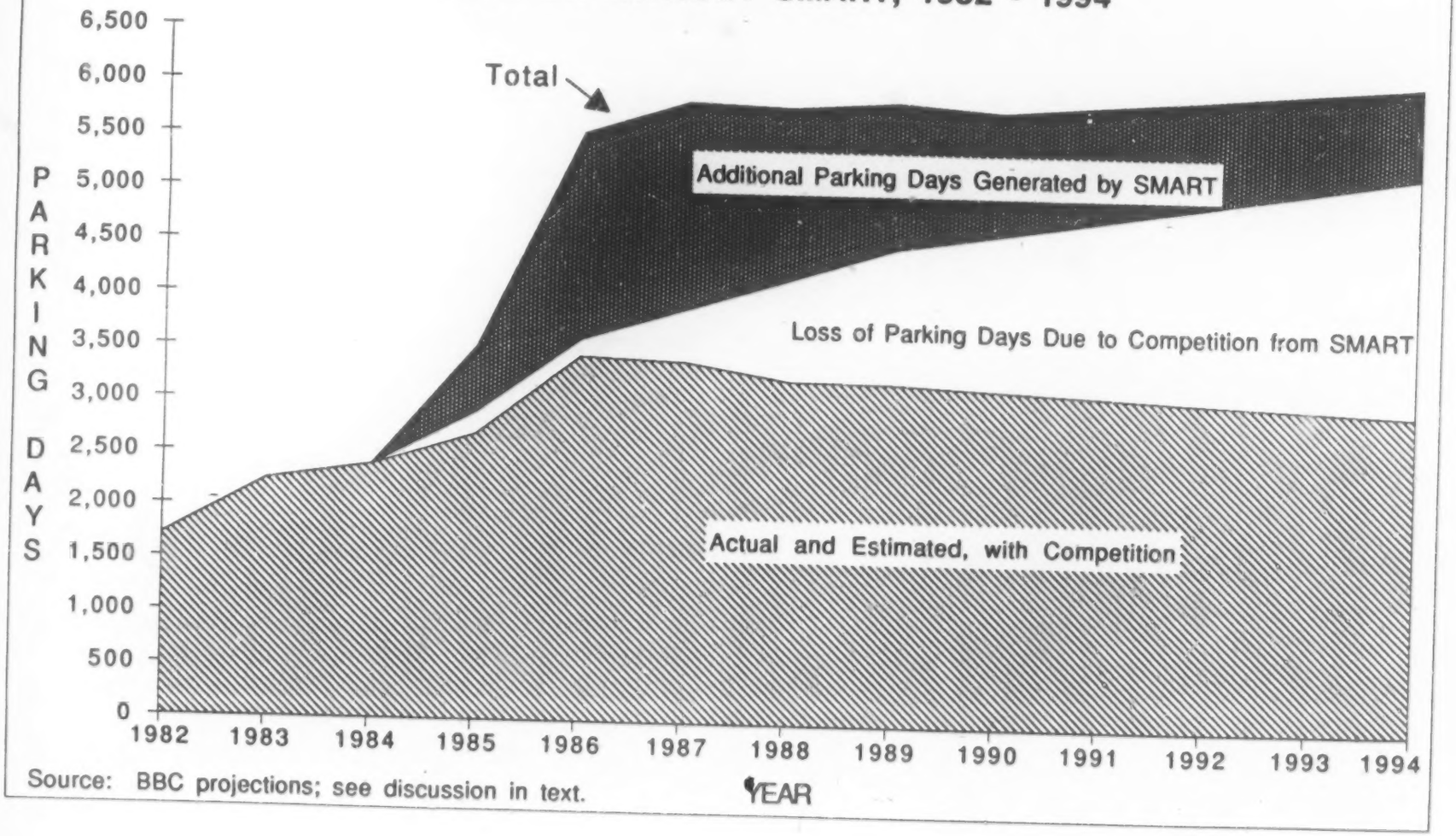
FIGURE II-4. AVERAGE PARKING DAYS, SHUTTLE BUS PARKING, FOUR PRIVATE FIRMS WITHOUT SMART, 1982-1989, WITH PROJECTIONS TO 1994



Source: BBC projections; see discussion in text.

CONFIDENTIAL & PRIVILEGED

FIGURE II-5. CUMULATIVE AVERAGE PARKING DAYS, SHUTTLE BUS PARKING, FOUR PRIVATE FIRMS, WITH OR WITHOUT SMART, 1982 - 1994



Source: BBC projections; see discussion in text.

CONFIDENTIAL & PRIVILEGED

SECTION III. OVERVIEW OF MARKETING EFFORTS BY SMART AND PRIVATE OPERATORS

As part of our analysis of the impact of SMART on the four private operators, we have assessed available information on the marketing efforts of all the operators of shuttle bus parking services at Stapleton International Airport.

The marketing efforts described in this section include:

(1) Pricing policies

(2) Advertising

(3) Signage (both external to the airport and internal)

(4) Access to airport passengers

(5) Special promotions

Pricing

The pricing policies of the private operators and SMART were described in Section II. In effect, it appears that because of its dominant market position today, SMART is the price leader; whatever it charges, the private companies are obliged to approximate. It is also evident that SMART used low prices and other marketing efforts described in this section during the 1985-1986 period to build volume and market share.

Present pricing policies by the private operators are comparable with the charges by SMART. At present, SMART charges $4.00 for 24 hours, and the two largest

private firms, Allright and Monaco, charge $4.00 and $3.75 respectively for the same time period. Continental also charges $4.00 while Premier charges $3.75 for its basic service.

Advertising

The private operators are not actively engaged in traditional media advertising. However, their company-painted shuttle buses circulating through the airport provide advertising to passengers arriving at or leaving the airport. Most of the private operators also provide discount coupons to selected travel agencies which are passed along to their customers within their airline ticket packet. And, all private operators have signage on their lots.

SMART advertises in the same way; its buses are visible to passengers, especially those exiting the airport from the lower level. However, SMART also follows a policy of maintaining the physical presence of one of its buses in front of the airport terminal at all times. This has significant advertising value, especially with its exclusive pickup location visible from the main exiting doors on the lower level of the airport terminal (see Figure III-1).

FIGURE III-1. SHUTTLE BUS PICKUP LOCATIONS

CONFIDENTIAL & PRIVILEGED

On the other hand, shuttle buses used by the four private firms can not pick up passengers in the prime pickup areas; they are required to drive past the location used by SMART, pick up their customers at the more outlying locations, and leave as quickly as possible. (based on testimony by Dan Bragassa, manager of operations for Allright Parking, June 27, 1989, p. 104).

SMART advertises in other ways. The availability of parking in lots #2 and #3 is broadcast over the airport information radio. AM station 530, beamed at persons approaching the airport. There are numerous signs along heavily travelled routes to Stapleton suggesting that travelers tune in this low-powered station. The City will not allow the private shuttle bus parking operators to provide similar information on this station.

Signage

There are signs along the main approaches to Stapleton notifying motorists of the availability of remote parking in lots #2 and #3. There are large ground transportation signs on both the inside and outside of each exiting door, and at the exclusive SMART bus stops on the lower level, prominently displaying the SMART logo.

The City prohibits the private shuttle bus parking companies from using similar signage on the public right-of-way and on airport premises. The only signage displayed by the four private shuttle bus parking companies is on their parking lots. There are no signs along Monaco Parkway, Quebec Street, or Smith Road providing information concerning shuttle bus parking lots, other than what the airport has posted for the SMART lots.

Accessibility

SMART has, in the past, enjoyed a significant competitive advantage over the four private shuttle bus parking companies by virtue of its more visible and accessible pick up points in front of the most heavily used lower level airport doors. With 85 percent of the passengers departing Stapleton using baggage claim carousels near doors 1 through 9, SMART's pick up points have been in front of doors 4 through 7. These pick up locations are shown on Figure III-1.

With the changes made in September, 1989, SMART may have lost some of its competitive advantage in terms of accessibility. The south pick up point, formerly near door 5, has been moved to the area near door 1 (see Figure III-1).

Even with the recent changes, SMART's pick up locations are superior to those of the private operators. The four private shuttle bus parking companies are allowed to pick up their customers only at locations near doors 1 and 12 near either end of the terminal.

Using the terminology of retail analysis, SMART has had, and continues to enjoy, an intercepting location. Many customers, or potential customers, of the four private operators walk by SMART's buses to get to their own shuttle buses. In retailing, this is a significant factor in the ability of a business to attract and retain customers.

The inability of the private shuttle bus parking operators to pick up customers at locations other than the designated areas near doors 1 and 12 appears to have had a negative impact on customers' attitudes.

Related to the accessibility differences, SMART uses a "bumping" system – its buses do not leave until another arrives – with no penalty for length of stay. On the other hand, the private companies incur financial penalties beyond the trip fee if it takes them longer than 15 minutes to pick up passengers at their two locations.

Special Marketing Efforts

In addition to the marketing efforts described above, at certain peak periods of customer usage Stapleton advertises parking availability through the public media without mentioning private parking availability.

SMART has also, upon occasion, made extensive use of commercial radio and daily newspaper advertising.

The Trip Fee

Another aspect of competitive advantage enjoyed by SMART comes from the higher costs imposed on private competitors in the form of trip fees. It is our understanding that this fee was increased from $30 per month per vehicle to 42 cents per trip. The increase in this fee reduces the price competitiveness of the private firms by restricting their ability to respond to future price initiatives by SMART. SMART has previously shown a willingness to cut prices to increase volume; private operators have less capability to match SMART's pricing moves.

The access and penalty fees constitute an added cost that reduces profitability for the private operators. SMART's exclusion from paying trip and penalty fees

while waiting in the loading zones has the effect of lowering its costs compared with its competitors, the four private shuttle bus parking companies.

Summary of Marketing Efforts

It appears that SMART has three major competitive advantages over the four privately-owned shuttle bus parking operators. The first competitive advantage is the City's preferred intercepting location at the front of the terminal. Secondly, SMART has radio messages and signs notifying potential customers of the locations of its lots, and the availability of parking spaces. And third, the distinctively-painted SMART buses waiting in front of the lower level of the terminal have significant advertising value.

From a pricing point of view, the differences between SMART and the private operators are small. The signage inside the terminal is not viewed as a significant factor favoring SMART.

Supreme Court, U.S.
FILED
OCT 29 1991
OFFICE OF THE CLERK

(2)

No. 91-572

In The

Supreme Court Of The United States

October Term, 1991

Allright Colorado, Inc.; Continental Airport Parking, Inc.; Ennis, Inc., d/b/a Monaco Parking; Phchodaux Howdy International Group, Inc., d/b/a Premier Parking, Inc.;

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a governmental subdivision of the State of Colorado, d/b/a SMART; JOHN MROZEK, in his capacity as Manager of Public Works; GEORGE DOUGHTY, in his capacity as Director of Aviation of Stapleton,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

Respondents' Brief In Opposition

Helen Eckardt Raabe
(Counsel of Record)
Office of the City Attorney
3231 Terminal Building
Stapleton International Airport
Denver, Colorado 80207
(303) 270-1475

October 30, 1991

QUESTIONS PRESENTED FOR REVIEW

I. Whether the actions of respondents the City and County of Denver, Manager of Public Works John Mrozek, and Director of Aviation, George Doughty, in establishing rules and regulations governing ground transportation at Stapleton International Airport, are immune from the antitrust laws by virtue of state action immunity.

II. Whether the Court of Appeals correctly found Denver to be immune from antitrust laws even though Denver's airport operations also include authorized and necessary market activity such as providing parking facilities on airport grounds.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED . 3

I. THE TENTH CIRCUIT CORRECTLY APPLIED THE STATE ACTION IMMUNITY DOCTRINE AND THERE IS NO REASON FOR THIS COURT TO REVIEW THE TENTH CIRCUIT'S RULING 3

II. THIS CASE DOES NOT PRESENT A MEANINGFUL OPPORTUNITY FOR SUPREME COURT CONSIDERATION OF STATE ACTION IMMUNITY BECAUSE THE TRIAL COURT IN THIS CASE HAS ALREADY DENIED PETITIONERS' ANTITRUST CLAIM ON ITS MERITS 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES **PAGE**

Allright Colorado, Inc. v. City and County of Denver, 937 F.2d 1502 (10th Cir. 1991) 4, 6, 7

City of Columbia v. Omni Outdoor Advertising, Inc., ___ U.S., ___ 111 S.Ct. 1344, 113 L. Ed 2d 382 (1991) . 3, 4, 5

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 4

Commuter Transportation System, Inc. v. Hillsborough City Aviation Authority, 801 F.2d 1286 (11th Cir. 1986) 6

Hillman Flying Service, Inc. v. City of Roanoke, 652 F.Supp. 1142 (W.D. Va. 1987), aff'd 846 F.2d 71 (4th Cir. 1988) 6

Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co., 760 F.2d 607 *(5th Cir. 1985) cert. denied* 474 U.S. 903 6

Interface Group, Inc. v. Mass. Port Authority, 816 F.2d 9 (1st Cir. 1987) 6

Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir. 1986) *cert. denied* 479 U.S. 872 6

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 5

STATUTES

Colo. Rev. Stat. § 31-15-711(f) 6

Colo. Rev. Stat. § 41-1-101 6

Colo. Rev. Stat. § 41-3-103(2) 5, 7

Colo. Rev. Stat. § 41-4-101 . . . . . 5, 8

Colo. Rev. Stat. § 41-4-106 5

OTHER AUTHORITIES

Federal Rule of Civil Procedure 41(b) 2

No. 91-572

In The

Supreme Court Of The United States

October Term, 1991

o

Allright Colorado, Inc.; Continental Airport Parking, Inc.; Ennis, Inc., d/b/a Monaco Parking; Phchodaux Howdy International Group, Inc., d/b/a Premier Parking, Inc.;

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a governmental subdivision of the State of Colorado, d/b/a SMART; JOHN MROZEK, in his capacity as Manager of Public Works; GEORGE DOUGHTY, in his capacity as Director of Aviation of Stapleton,

Respondents.

o

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

o

Respondents' Brief In Opposition

o

STATEMENT OF THE CASE

Respondent the City and County of Denver owns and operates a municipal airport known as Stapleton International Airport. Respondents the City and County of Denver, John Mrozek as Manager of Public Works, and George Doughty as Director of Aviation, will hereinafter be referred to collectively as "Denver". The petitioners are operators of private shuttle bus parking lots located near the Airport.

Petitioners filed a Complaint in the United States District Court alleging that Denver violated the antitrust laws in its operation of Stapleton International Airport. A trial was held in November of 1989 and at the close of plaintiffs' case, the District Court ruled in Denver's favor and granted Denver's Motion for Dismissal under Rule 41(b) of the Federal Rules of Civil Procedure.

The District Court first found that Denver was not immune from antitrust laws, a ruling that the Tenth Circuit corrected in its decision on appeal. The District Court then held a trial on the merits of petitioners' antitrust claim, and found on the evidence that petitioners failed to establish either an attempt to monopolize, an actual monopoly, monopoly power, or a dangerous probability of success in establishing a monopoly in the future. In other words, the District Court has already found no violation of Section 2 of the Sherman Act in a trial, yet petitioners still wish this Court to grant certiorari to review the threshold question of state action immunity.

The petitioners' statement of facts states that the Tenth Circuit set forth instances "where Denver has used its governmental power to hinder its private competitors in its attempt to monopolize a market in which it is now the leading participant." (Petition at 4).

For the petitioners to present this as a statement of fact is incorrect, because the actual findings by the trial court at trial were that there was no specific intent to monopolize and no sufficient evidence that Denver attempted to monopolize the market within the meaning of the antitrust laws. (Petition App. at 36-37).

In making its ruling on the merits, the trial court also found that public parking at the Airport was necessary to the operation of the Airport. (Petition App. at 29). The trial court also found that Denver's shuttle bus system was used for more than just shuttle lot parking; that it was also used to transport persons from one concourse to another, including the remote concourses. (Petition App. at 42).

The Circuit Court of Appeals for the Tenth Circuit affirmed the ruling of the trial court, but did so on the basis that the trial court should have granted state action immunity to Denver. The Court of Appeals held that state action immunity applied and that Denver was not subject to the antitrust laws in its operation of the Airport.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE TENTH CIRCUIT CORRECTLY APPLIED THE STATE ACTION IMMUNITY DOCTRINE AND THERE IS NO REASON FOR THIS COURT TO REVIEW THE TENTH CIRCUIT'S RULING.

The Tenth Circuit's decision correctly applied the state action immunity doctrine in accordance with settled rulings of this Court and in a manner consistent with all other Circuit Courts of Appeals.

Denver's action which formed the basis for petitioners' Complaint was the adoption of Rules and Regulations governing ground transportation at Stapleton International Airport. In particular, those Rules and Regulations increased the fee which petitioners' shuttle buses were charged. The petitioners requested an injunction under the antitrust laws to prohibit the Airport from charging a fee of 42 cents for a 15-minute stay by petitioner's shuttle buses in the passenger pick-up area at the Airport. (Petition App. at 31).

The Airport's Rules and Regulations for ground transportation assess fees against various commercial ground transportation users, including petitioners, regulate the traffic flow and locations for pick-up, and generally require that appropriate permits or concession agreements be obtained by all commercial ground transportation users. (Petition App. at 32, 45).

In establishing such fees and permit requirements, the Airport is engaged in regulating ground transportation at the Airport. It is acting in a regulatory capacity and is not acting as a private market participant. Petitioners do not dispute the Tenth Circuit's holding that application of this Court's well-established standards for state action immunity result in immunity for Denver in this case. Rather, the essence of petitioners' argument is that since the Airport is a market participant in providing necessary shuttle parking at the Airport, the established state action immunity test should not be used - a new standard should be created - and the Airport's regulation of ground transportation users should be subject to the antitrust laws.

Petitioners cite *City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 113 L. Ed 2d 382 (1991) in support of this claim. However, the language in that case to which petitioners cite is completely misread by petitioners. The language in *City of Columbia,* which is dicta, implies that state action immunity might not obtain where the City is *"not acting in a regulatory capacity"*, but only as a market participant. 111 S.Ct. at 1351 (emphasis added). In this case, the

Airport was without question acting in a regulatory capacity and petitioners were clearly attempting to enjoin Airport regulations, not market conduct.

As explained correctly by the Tenth Circuit in its ruling:

> The fact that the City is also in some sense a competitor of plaintiffs does not alter the basic test for state action immunity nor does it diminish the City's regulatory authority over the Airport and plaintiffs' activities.

Allright Colorado, Inc., 937 F.2d 1502, 1510 (Petition App. at 20).

Justice Scalia's suggestion must also be placed in the context of the case in which it arose - a Section 1 conspiracy claim. Under *City of Columbia* read as a whole, an exception to immunity might obtain only where a municipality was 1) not acting in an authorized regulatory capacity, *and* 2) alleged to be conspiring with a private entity under Section 1 of the Sherman Act. Far from creating a possible new exception to state action immunity, as petitioners claim, *City of Columbia* was instead reconstructing and narrowing the scope of what was formerly known as a possible "conspiracy" exception.

Also as noted correctly in the Petition itself, the language in *City of Columbia* is only a suggestion, not a rule of law or doctrine that has ever been applied in any case. (Petition at 7). The suggestion was duly noted by the Tenth Circuit in this case and properly disregarded as inapplicable. *Allright Colorado, Inc.*, 937 F.2d 1502, 1510 (Petition App. 20).

The Tenth Circuit held that under this Court's decisions since *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978), the focus of inquiry for antitrust immunity has always been whether a local government is acting pursuant to a "clearly articulated and affirmatively expressed" state policy, and whether anticompetitive restraint is a foreseeable result of what the statute authorizes.

The state legislation which authorizes Denver to own and operate the Airport is extensive, specific, and replete with language authorizing the particular actions by Denver which are complained of here. To begin with, the statutory definition of "airport" itself includes authorization to own land, buildings, and facilities . . .

> together with all appurtenances necessary or convenient thereto for the accommodation of convenience of the public, whether or not the members of the public so accommodated are directly or indirectly engaged in transportation by air, including, but not limited to, parking, dining, recreational, and hotel facilities.

Colo. Rev. Stat. 41-3-103(2).

The state statutes further provide that:

> the acquisition of any lands for the purpose of establishing airports or other air navigation facilities . . . ; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports . . . ; and the exercise of any other powers granted in this part I to any county, city and county, city . . . are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity . . .

Colo. Rev. Stat. 41-4-101.

Finally, and perhaps most significantly, the statutes provide that any county operating an airport has the express authority:

> to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airport; to exact and require charges, fees, and tolls . . . ; to lease or assign for operation such space or area, appurtenances, appliances, or other conveniences necessary or useful in connection therewith; to own and operate aircraft, to employ pilots; to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport . . .

Colo. Rev. Stat. 41-4-106.

This Court in *Town of Hallie v. City of Eau Claire,* 417 U.S. 34 (1985) as well as *City of Columbia,* further clarified the application of state action immunity to actions taken by local governments. This Court held that local governments are entitled to state action immunity when their activities are authorized by the state. In various cases such as *Hallie* and *City of Columbia,* this Court has uniformly rejected arguments that the state must compel the activity, that the state must actively supervise the activity, that the anticompetitive conduct must be expressly mentioned in the legislation, or that the court should examine the subjective motives of the municipality in determining whether immunity attaches.

Petitioners' entire claim is based on their status as competitors of the City in the operation of parking lots. However, in addition to the express inclusion of authority to conduct parking as part of an airport operation (Colo. Rev. Stat. 41-3-103(2) cited above), other state legislation also specifically authorizes municipalities to:

> provide by ordinance for the construction, maintenance and operation of public parking facilities, buildings, stations, or lots . . .
>
> Colo. Rev. Stat. 31-15-711(f).

Ownership and operation of a municipal parking lot automatically places the City in a "competitive position" with private parking lot companies; thus the legislature must have foreseen and intended the possible anticompetitive effect of allowing municipalities to enter the parking market. Similarly, when the legislature in Colo. Rev. Stat 41-1-101 et. seq. authorized municipalities operating airports to also own "parking, dining, recreational, and hotel facilities" in connection with the airport, and to own aircraft and employ pilots in connection with the airport, it is axiomatic that the legislature contemplated the potential anticompetitive or monopoly impacts of allowing government to enter these ancillary markets, especially in connection with a city government's operation of an airport, which is often a natural monopoly in that municipality already.

As summarized in the Tenth Circuit's opinion, 937 F.2d 1502, 1508 (Petition App. at 16-17), other recent Courts of Appeals have uniformly held airport authorities immune from antitrust laws where state statutes authorize them to regulate access to and use of the airport property and facilities. See *Interface Group, Inc. v. Mass. Port Authority,* 816 F.2d 9 (1st Cir. 1987) (Authority operating Logan Airport is immune where state has clearly authorized the activities in question); *Commuter Transportation System, Inc. v. Hillsborough City Aviation Authority,* 801 F.2d 1286 (11th Cir. 1986) (Authority's actions in regulating number of contracts with limousine companies were contemplated by the state legislature and are immune from antitrust scrutiny); *Montauk-Caribbean Airways, Inc. v. Hope,* 784 F.2d 91 (2d Cir. 1986), *cert. denied* 479 U.S. 872 (broad statutory authority to enter into contracts resulted in immunity for Town's actions in denying year-long rights to a charter airline); *Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co.,* 760 F.2d 607 (5th Cir. 1985), *cert. denied* 474 U.S. 903 (municipal airport authority's actions in restricting number of taxicab companies was exempt from Sherman Act even though broad statutory authority did not expressly mention ground transportation); *Hillman Flying Service, Inc. v. City of Roanoke,* 652 F.Supp. 1142 (W.D. Va. 1987), aff'd. 846 F.2d 71 (4th Cir. 1988) (statutory authority to "acquire, construct, maintain, and operate airports and related structures, properties and facilities" resulted in immunity for actions of City in granting an exclusive right to sell aviation fuel).

There is thus no split or conflict in the Courts of Appeals on this issue.

The Tenth Circuit properly ruled that Denver is immune from antitrust laws in its operation of the airport and regulation of ground transportation thereon, whether or not the Airport's operations also include authorized and necessary market activity at the Airport such as parking. Therefore, there is no reason for this Court to reexamine the Tenth Circuit's application of the state action immunity doctrine in this case.

II. THIS CASE DOES NOT PRESENT A MEANINGFUL OPPORTUNITY FOR SUPREME COURT CONSIDERATION OF STATE ACTION IMMUNITY BECAUSE THE TRIAL COURT IN THIS CASE HAS ALREADY DENIED PETITIONERS' ANTITRUST CLAIM ON ITS MERITS.

Rather than posing a serious issue concerning this Court's standard for state action immunity, the petitioners pull a suggestion from dicta in one recent opinion, misread and misapply that suggestion, and then ask this Court to clarify the suggestion in a case where the entire state action immunity issue is moot because the trial court has already denied petitioners' claim on the merits.

As noted by the Tenth Circuit, the trial court has already ruled that the petitioners:

> failed to establish that there was a dangerous probability of success in monopolizing the relevant market and that defendants had a specific intent to monopolize. Plaintiffs' attempt to monopolize claim was therefore dismissed. The court held that plaintiffs' monopolization claim failed apparently because plaintiffs failed to prove monopoly power.

Allright Colorado, Inc., 937 F.2d 1502 (Petition App. at 7).

There was ample evidence from petitioners' own testimony which supported these findings. For example, the Airport's share of the market (45%) did not itself establish monopoly power, and the petitioners offered no expert testimony at trial that Denver had either a monopoly or monopoly power. (Record, Tr. at 345-351). The evidence established that there were no entry barriers in the market and that there is healthy competition. (Record,Tr. at 31-34, 355). The testimony indicated that the Airport did not dictate prices, that the plaintiffs' prices were set by what the market would bear, and that plaintiffs would not necessarily increase their prices as a result of the Airport's fee. (Record, Tr. at 21-22, 42-45, 88, 346, and 356-57). The District Court

held that the plaintiffs' own evidence established that there was no monopoly, no dangerous probability of a monopoly succeeding, and no intent on the part of Denver to establish a monopoly.

Therefore, the petitioners are asking this Court to grant a writ of certiorari, change settled law which has been established by this Court in the last ten years and which this Court has just reconfirmed in 1991, and send this case back to the Court of Appeals only to have the Court of Appeals reaffirm the trial court on the merits. Therefore, this case does not offer a meaningful opportunity for this Court to readdress state action immunity.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

Helen Eckardt Raabe
(Counsel of Record)

Office of the City Attorney
Room 3231
Stapleton International Airport
Denver, Colorado 80207
(303) 270-1475

Counsel for Respondents
The City and County of Denver,
John Mrozek, as Manager of
Public Works, and
George Doughty, as Director
of Aviation

(3)

No. 91-572

FILED
NOV 22 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ALLRIGHT COLORADO, INC.; CONTINENTAL AIRPORT PARKING, INC.; ENNIS, INC., d/b/a/ MONACO PARKING; PHCHODAUX HOWDY INTERNATIONAL GROUP, INC., d/b/a/ PREMIERE PARKING, INC.,

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a governmental subdivision of the State of Colorado, d/b/a SMART; JOHN MROZEK, in his capacity as Manager of Public Works; GEORGE DOUGHTY, in his capacity as Director of Aviation of Stapleton,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

RICHARD L. SHEARER
Counsel of Record
LANGDON J. JORGENSEN
NORMAN F. KRON, JR.
CALKINS, KRAMER, GRIMSHAW & HARRING, P.C.
1700 Lincoln Street
Suite 3800
Denver, CO 80203
(303) 839-3800

Attorneys for Petitioners

November, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY TO NEW ARGUMENTS RAISED BY RESPONDENTS PURSUANT TO RULE 12-6

I. RESPONDENTS' STATEMENT OF THE CASE IGNORES AN EXPRESS FINDING OF THE TRIAL COURT: THAT RESPONDENTS DID USE THEIR GOVERNMENTAL POWER TO UNDERTAKE CONDUCT IN FURTHERANCE OF AN ATTEMPT TO MONOPOLIZE THE MARKET.

Petitioners feel compelled to reply to Respondents' implication that Petitioners were not truthful in their factual statement with respect to the findings of the trial court on the issue of intent to monopolize. The Petitioners' statement of the case contains a fair and accurate conclusion concerning the trial court's ruling on this issue. Although the Respondents would like to have this Court believe otherwise, the trial court found:

> There is also a case made for the fourth element, conduct in furtherance of an attempt to monopolize [citing examples from the evidence of Respondents' use of anticompetitive governmental fees and restrictions]. (Petition App. at 34-35).

Petitioners reaffirm their original position: The trial court found, based upon the evidence at trial, that Denver used its governmental power to hinder its private competitors in an attempt to monopolize a market in which it is now the largest market participant.

II. RESPONDENTS' SUGGESTION THAT PETITIONERS WOULD SOMEHOW DENY THE CITY AND COUNTY OF DENVER LAWFUL RIGHT TO COMPETE IS ERRONEOUS.

Respondents suggest that Petitioners do not think that the City and County of Denver should be allowed to enter the relevant airport shuttle bus parking market (see Respondents' Brief in Opposition at 6). This is a mischaracterization of Petitioners' argument. Petitioners have never taken this position. Petitioners have repeatedly stated that if the Respondent City and County of Denver chooses to become a commercial participant in the shuttle bus parking market, it must, like everyone else, comply with federal antitrust laws.

III. RESPONDENTS' THEORY THAT THE TRIAL COURT'S DECISION, ADVERSE TO PETITIONERS, RENDERS THE CASE "MOOT" OR CAUSES ANY DECISION OF THIS COURT TO BE ADVISORY IS ERRONEOUS AND GROSSLY MISLEADING.

Respondents point out, accurately, that the trial court rendered a decision adverse to the Petitioners on the issue of whether the City and County of Denver had monopoly power as that term is used in Section II of the Sherman Antitrust Act. However, the trial court's ruling on the monopoly power issue was a ruling on the law, not on the facts, and was itself the principal issue in the Petitioners' appeal to the Tenth Circuit, and therefore the trial court's adverse ruling on this issue is not dispositive and does not cause the issue raised on this appeal to be moot.

Two legal issues of national importance were addressed by the trial court in this case. The first was whether the City and County of Denver had state action antitrust immunity and the second was whether local governmental power could constitute "monopoly power" as that term is used in Section II of the Sherman Antitrust Act. The trial court ruled in favor of the Petitioners on the first issue, and adversely to Petitioners on the second. Both issues were presented to the Tenth Circuit by an appeal and cross-appeal (Petition App. at 8-9). The Tenth Circuit based its erroneous decision solely on the state action immunity issue and did not address the equally-important governmental power/monopoly power issue. (Petition App. at 21, "We therefore reverse the district court's conclusion that defendants' activities were not immune from antitrust challenge. Accordingly, we need not address the merits of the antitrust claims.")

Petitioners considered placing both issues into their Petition for Writ of Certiorari, but concluded that the second issue was not yet ripe for this Court's consideration. If this Court accepts Certiorari and reverses the Tenth Circuit on the immunity issue, the Tenth Circuit will have the opportunity to make the correct decision on the governmental power/monopoly power issue. However, the Respondents' assertion that the entire case is "moot" because the Petitioners lost "on the merits" (Brief in Opposition at 7) is a gross distortion of the status of the case.

The fact that the trial court decision went against the Petitioners on an issue which was itself the subject of appeal and which has never been addressed by the appellate court does not render an issue "moot." *Powell v.*

McCormack, 395 U.S. 486, 500, 89 S.Ct. 1944, 1953, 23 L.Ed.2d 491, 505 (1969). In *Powell*, as in this case, Respondent "confuses mootness with whether [Petitioner] has established a right to recover." We are now before this Court to establish a right to be heard, it remains to be seen whether, on remand, the Tenth Circuit will correct the trial court's error on the monopoly power issue. *Powell v. McCormack*, 395 U.S. at 500 and 89 S.Ct. at 1953, 23 L.Ed.2d at 505, footnote 16 cogently sets forth the appropriate procedure for disposition of a multiple issue case of the kind presently before this Court:

> Where a court of appeals has misconceived the applicable law and therefore failed to pass on a question, our general practice has been to remand the case to that court for consideration of the remaining issues.

There is no mootness here, clearly the parties continue to have a personal stake in the outcome, the courts are capable of resolving the controversy, *United States Parole Commission v. Geraghty*, 445 U.S. 388, 394, 100 S.Ct. 1202, 1208, 63 L.Ed.2d 479, 490 (1980), the issues remain "live," and it is beyond question that the "parties have a legally cognizable interest in the outcome." *Murphy v. Hunt*, 445 U.S. 478, 481, 102 S.Ct. 1181, 1185, 71 L.Ed.2d 353, 358 (1982).

Petitioners appreciate the opportunity afforded by the Respondents to mention that there are two issues of clear national importance in this case, and that acceptance of Certiorari will allow both of these issues to be addressed at the appellate level; with the state action antitrust immunity issue to be addressed by this Court and, the governmental power/monopoly power issue to

be addressed by the Tenth Circuit upon remand. To Petitioners' knowledge, the governmental power/monopoly power issue has not yet been judicially addressed in any published opinion.

Respectfully submitted,

CALKINS, KRAMER,
GRIMSHAW & HARRING, P.C.

RICHARD L. SHEARER
Counsel of Record
LANGDON J. JORGENSEN
NORMAN F. KRON, JR.
1700 Lincoln Street
Suite 3800
Denver, Colorado 80203
Telephone: (303) 839-3800

Attorneys for Petitioner